Supreme Court of the United States.

DECEMBER TERM, 1867.

THE MILWAUKEE & MINNESOTA R. R. Co., Appellant,
vs.
SELAH CHAMBERLAIN. } No. 220.

THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY
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BRIEF OF THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

C. CUSHING.

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I. STATEMENT OF CASE.

1. The amended bill of the complainant in this case, the Milwaukee Company, which is a complete substitution for the original bill, except as to the address and description of the parties, states the incorporation of the La Crosse and Milwaukee Railroad Company, the mortgage to Barnes, foreclosure and sale under the Barnes mortgage, and organization of the Milwaukee and Minnesota Railroad Company.

States fradulent lease and judgment given to Chamberlain by La Crosse Company, to hinder, delay, and defraud its creditors.

That the La Crosse Company had no power to make said lease.

That Chamberlain took possession of the La Crosse Railroad under said lease.

That Newcombe Cleveland recovered judgment against La Crosse Company, and after levying his execution on the property of the Company, filed his bill against Chamberlain to

have said lease and judgment declared fraudulent and void; and that decree to that effect was made in the cause.

That Chamberlain continued in possession of the La Crosse Railroad, receiving large sums of money, which he failed to apply to the payment of interest as he was bound to do on the mortgage to Bronson & Soutter, but voluntarily surrendered said road to said Bronson & Soutter, and thus estopped himself ever to claim any interest under said lease.

That Chamberlain pretends that his said lease and judgment are in full force.

That said complainant charges lease and judgment are a cloud on complainant's title.

Bill prays, that Chamberlain may be enjoined from setting up any claim under his said lease or judgment, that he may be ordered to surrender said lease to be cancelled, and acknowledge satisfaction on said judgment, and for other and further relief.

2. The answers of Chamberlain and the Milwaukee and St. Paul Company state that the said lease and judgment were *bona fide,* and that complainant cannot claim benefit of the decree pronouncing them fraudulent in the case of Newcombe Cleveland against Selah Chamberlain, and that the questions raised in this case are *res ajudicata.*

3. The St. Paul Company in their answer claim to be the assignee for a valuable consideration of the lease and judgment to Chamberlain, prior to the filing of the bill in this case by the complainant, the Milwaukee and Minnesota Railroad Company.

4. On the 23d of May, 1865, in the progress of this cause, the St. Paul Company filed, by leave of the Court, their cross bill against the Milwaukee and Minnesota Company and Selah Chamberlain, claiming that the lease and judgment to Chamberlain were *bona fide* and for a valuable consideration, and that said lease and judgment had been for a valuable consideration assigned to them previous to the filing of the bill of the Milwaukee and Minnesota Railroad Company against Selah Chamberlain and this defendant. The St. Paul Company, as assignee of said lease and judgment, ask

the aid of the Court to recover the same from the Milwaukee and Minnesota Company.

5. Considerable evidence was taken on the part of the Minnesota Company, and Selah Chamberlain and the St. Paul Company, and the Court decreed as follows:

"THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY
vs.
"SELAH CHAMBERLAIN AND THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY. } In Equity.

"MILWAUKEE AND ST. PAUL RAILWAY COMPANY
vs.
"THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY AND SELAH CHAMBERLAIN. } In Equity. Cross Bill.

"This day came the parties by their counsel, and this cause having been submitted to the Court at the April term, 1865, upon the pleadings and printed argument of counsel, both on the original and cross bill, and the Court having taken the same under advisement, and being now fully advised in the premises, is of the opinion that the Milwaukee and St. Paul Railway Company, and the Milwaukee and Minnesota Railroad Company, being both corporations existing in the State of Wisconsin, and organized under the laws and doing business therein, are not in law capable of litigating in this Court the matters and things set forth in the cross bill of said Milwaukee and St. Paul Railway Company, and said cross bill is accordingly dismissed for want of jurisdiction without prejudice.

"And it appearing also that lease of the La Crosse and Milwaukee Railroad Company to Selah Chamberlain, set forth in the original bill of the Milwaukee and Minnesota Railroad Company, and which that bill prays to have set aside and declared null and void, was assigned by said Chamberlain to the Milwaukee and St. Paul Railway Campany before said original bill was filed, and that said Chamberlain had then no more than a nominal interest in said lease, and the said Milwaukee and St. Paul Railway Company being then and now the real party in interest under said lease, and the Court being of opinion that said last mentioned company is an indispensable party to any proceedings to set aside and annul said lease, and that no such litigation can proceed in this Court between said Milwaukee and Minnesota Railroad Company and said Milwaukee and St. Paul Railway Company

in regard to said lease, the bill is hereby dismissed for want of jurisdiction, but without prejudice to any other suit which the parties may see proper to institute concerning the same matter in a proper Court.

"And the Court being of opinion that the matters and things set forth in the pleadings and evidence in this cause do not establish such fraud or other wrong in the judgment recovered by said Selah Chamberlain against the La Crosse and Milwaukee Railroad Company as justifies the relief prayed by said original bill in regard to said judgment, and also of the opinion that the decree in the case of Newcomb Cleveland against said Chamberlain referred to in said original bill does not conclude that question in this suit, it is therefore ordered and decreed, as to said judgment, that the bill of complaint be dismissed on the merits, and that complainants in the original bill pay the costs of the proceedings in said cause, and the complainants in the cross bill pay the costs in that cause.

SAMUEL F. MILLER, *Judge.*"

Transcript, Nos. 220, 221; *p.* 143.

6. From this decree both the Minnesota Company and the St. Paul Company appealed.

II. CONSIDERATIONS OF LAW.

1. On the threshold of this case, it occurs to us to observe that it seems singular that the Court should have held that as to the lease to Chamberlain, the Court could not take cognizance of the case as the St. Paul Company was a necessary party, and the Court would not exercise jurisdiction over the St. Paul Company, as it was evident in the State of Wisconsin, and yet the Court proceeded to adjudicate in reference to the judgment, when the evidence showed that the judgment was assigned to the St. Paul Company as fully as the lease was.

Transcript Nos. 220, 221; *pp.* 143, 541, 542.

It is difficult to understand why the Court should act in regard to the judgment, and decline to act in reference to the lease. Independently of the fact of the evidence showing that the judgment as well as the lease was assigned to the

St. Paul Company, it is in proof that the judgment was only given originally as a support to the lease, on the advice of counsel that the lease might not be held valid. It seems, therefore, that it is not competent to the Court to separate the judgment from the lease, but both must share the same fate.

Either the Court had jurisdiction of the whole case, or of no part of it, in so far as that question depends on the interest of the St. Paul Company.

2. The first question is the matter of jurisdiction—whether the Court can consider the case as to the lease between the Minnesota Company and the St. Paul Company.

a. Upon this point reference is made to

Dunn *et al.* v. Clarke *et al.*, 8 Peters, 1.
Minnesota Co. vs. St. Paul Co., 2 Wallace, 607.

It is to be borne in mind that the Chamberlain judgment was rendered in the District Court of the United States. *Transcript* 220, 221, *pp.* 6, 128.

b. It is not competent for a State court to vacate or enjoin a judgment of the Federal Court. McKim v. Vorrhies, 7 Cranch, 279.

The complainants, the Minnesota Company, therefore, could not file a bill in a State court to vacate or enjoin the Chamberlain judgment. Unless they could have a remedy in the Federal Court, they would be in a most anomalous condition, with color of right to assert a claim, and yet with no right to a status in any court, to enforce such a claim. Such a consequence would justly be a reproach to our judicial system.

But no such reproach in fact lies.

In Dunn *et al. v.* Clarke *et al.*, 8 Peters, *p.* 1, it was held that a bill for injunction would be sustained where complainant and defendant were citizens of the same State, the defendant being executor of the plaintiff in the execution sought to be enjoined.

The Court say in this case, "No doubt is entertained by the Court that jurisdiction may be sustained, so far as to stay execution on the judgment at law against Dunn. He is the

representative of Graham; and although he is a citizen of Ohio, yet this fact, under the circumstances, will not deprive this Court of an equitable control over the judgment."

In this case the jurisdiction was maintained because Dunn was the representative of Graham.

In the bill filed by the complainant, the Minnesota Company, here, the St. Paul Company is the representative of Chamberlain as his assignee, and thereby becomes subject to the jurisdiction of the Court.

d. A creditor's bill may be maintained, though the complainants and defendants be citizens of the same State.

Hatch v. Dorr *et al.*, 4 McLean, 112.

See further—Morgan v. Morgan, 2 Wheaton, 290.

Dunlop v. Stetson, 4 Mason, 360.

Logan v. Patrick, 5 Cranch, 288.

It is submitted, therefore, that the jurisdiction of the Court is clear over the St. Paul Company, so far as the judgment is concerned.

e. Jurisdiction of the defendant, the St. Paul Company, being acquired by reason of the judgment, jurisdiction as to the lease follows as a necessary consequence, the lease and the judgment being part and parcel of the same transaction, intended to accomplish the same purpose, and inseparably connected together.

"Jurisdiction being acquired, the Court may settle other matters between the parties in the case, which do not afford original ground of jurisdiction."

Brooks v. Stolley, 3 McLean, 523.

3. The lease considered by itself is of no avail, because it had been abandoned by Chamberlain. See the Appendix.

As to the legality of the lease:

The doctrine that the property of a railroad company necessary to operate the road cannot be attached, does not apply where the attachment is to enforce a specific lien which accrued upon the acquisition of the property by the company without payment.

Hill vs. La Crosse R. R., 11 Wisconsin, R. 214.

In England, judgment creditors of railroad will be postponed to the holders of debentures secured by a prior mortgage.

Long vs. Matherson, 2 Giff. 71.

Furness vs. Caterham, R. 27, Beav. 358.

The railroad company restrained, at instance of mortgagees, from delivering possession of its lands and tracts to a creditor who had constructed the railroad, and had obtained judgment and sued out an elegit.

Furness vs. Caterham R. R., 27 Beav. 358.

Storer, Judge, in Ludlow vs. Hurd, in Superior Court of Cincinnati, says:

"It is settled, we suppose, definitely, that the franchise which includes the right of toll cannot be levied on and sold, unless the legislature which granted it assent to the transfer. This was decided in the State vs. Rives, 5 Tredell, 267," cited in 2 Redfield vs. R. R., p. 544, note.

In Coe, Trustee, vs. Pennock *el. al.*, 6 American Law Register, court held that judgment creditor must proceed in equity, cited in 2 Redfield, p. 550, note. See same case, 23 Howard, 117.

The Supreme Court has repeatedly decided that a charter of incorporation is a contract between the State which grants it and the corporation. That is now an elementry part of the public law of the United States.

Woodruff vs. Trapnell, 10 Howard, 190.

Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 578.

Charles River Bridge vs. Warren Bridge, 6 Howard, 507.

Gordon vs. Appeal Tax, 3 Howard, 133.

But contracts are reciprocal, and as the States cannot take away the charter of the corporation unless it has reserved the right to do so, therefore it must be that the corporation cannot, unless by similar reservation, take itself away without consent of the State.

Clark vs. Washington, 12 Wheaton, 40.

"The corporation (railroad company) have no more right in equity or justice to transfer their obligations to other companies, or to natural persons, than the State have to withdraw them all together."

1 Redfield, p. 593, note.

"Railways possess also many extraordinary powers or franchises, which partake, more or less, of the quality of sovereignty. These are sometimes called the prerogative franchises of the corporation, * * and both currency and internal communication between different portions of a State are exclusively the prerogatives of sovereignty."

1 Redfield, p. 87.

This doctrine applies more particularly to corporations of general utility, and more especially to those which constitute public ways, and as such have been permitted by the State to exercise a part of its own eminent domain, as in the taking of lands for public use; of which class are railway companies. In such a case, not only is the charter a contract on the part of the chartered, but it is a public trust, to be administered by the corporation in accordance with the command of the State.

People vs. Albany and Vermont Railroad Co., 24 N. Y. 268.

On this principle it is that Great Britain railway companies are permitted to mortgage their tolls only; anything beyond that being prohibited by act of Parliament.

8 and 9 Vic. ch. 16.

Hence, also, in the United States it is coming to be understood that a railway company cannot dispose of its franchise, either directly, or by any contract or other act which contingently produces the same result, without permission of the Legislature.

Pierce vs. Emery, 32 N. H. 484.

Hall vs. Sullivan Railroad Company, 20 Law Rep. 183 S. C. Redfield on railroads, 578, note.

Troy & Rutl. R. R. Co. vs. Ken, 17 Barb. S. C. R. 571.

Salem Mill-Dam Co. vs. Ropes, 6 Pick. 23.

Arthur & Co. vs. R. R. Bank, 9 Sm. and M. 344.

Coe vs. Columbus R. R., 10 Ohio, N. Y. 372.
Chapin vs. Vermont R. R., 8 Gray 372.

Such authority of the Legislature may be previous to the latter act, by general or special law, or it may be posterior, according to the rule that *omnis ratihabitio mandato priori æquiparatur.*

Shaw vs. Norfolk R. R., 5 Gray, 162.

But any legislative authority in this respect must be strictly pursued, otherwise the bonds, mortgages, &c., executed by the Company, will be null and void. On that ground securities of the Grand Junction Railway Company, amounting to more than a million of dollars, have recently been pronounced null by the Supreme Court of Massachusetts.

Commonwealth vs. Smith, 9 Allen.

Franchise cannot be taken by adverse proceedings without special authority of Legislature.

Tippetts vs. Walker, 4 Mass. 595.
Gue vs. Tidewater Canal Co., 24 How, 257.

See also to the point that a mortgage or other conveyance of a franchise is *ultra vires* unless with assent of Legislature.

Wirch vs. Birk. Railway Co., 7 Railway Cases, 384.
S. York R. R. Co. vs. G. North. R. R. Co., 9 Excheq. 54.
Beman vs. Rufford, 7 Railway Cases, 48.
Shrews. & Birm. R. R. Co. vs. N. W. R. R. Co., 6 H. of Lords Cases, 113.
Treadwell vs. Salisbury Man. Co., 7 Gray, 404.
Warrenton vs. Western R. R. Co , 4 Met., 566.
E. Boston Trans. R. R. Co. vs. Hubbard, 9 Allen.

These doctrines have important bearing on the present case.

4. It does not appear that the Legislature of Wisconsin had made the property and franchise of a railway company subject to the ordinary process of judgment lien and sale therefor on execution. A railway company cannot of itself contract to any such effect. Such a contract would be *ultra vires.* From which it follows that the alleged judgment lien

can have no legal basis; and ought not for any object or purpose to be suffered to show itself in this court.

Coe vs. Columbus Railroad Co., 10 Ohio N. S., 372.

5. As to the question of fraud in the lease and judgment, see testimony of Hugh Lee,

Transcript 220, 221, p. 148.

In reference to one single item, the tunnel approaches, Mr. Lee, an expert, after examination and calculation, says the difference of the excavation, according to his estimate and that of Woodward, under which Chamberlain's account was made out, is $106,861.04.

Transcript 220, 221, *p.* 159.

See further for excess of work and charges under Chamberlain's contract,

Exhibit 1, *Transcript* 220, 221, *p.* 172.

See Byron Kilbourn's testimony explaining why the lease and judgment were given to Chamberlain.

Transcript 220, 221, *p.* 373.

See evidence of Thomas E. Purdy,

Transcript 220, 221, *p.* 389.

Hugh McFarlan testifies: "I was one of the directors of the La Crosse Railroad Company. I remember the fact of the lease being given to Selah Chamberlain. I had conversation with Mr. Chamberlain about the time the lease was given; it was about the time the lease was made. He said to me, at that time, in reply to my question, how much the company owed him, that the company owed him between four and five hundred thousand dollars, he thought, but he could not tell exactly, and he wanted security."

Transcript 220, 221, *p.* 294.

See evidence of Benj. H. Edgerton,

Transcript 220, 221, *p.* 295, 397

Edgerton says: "We made a calculation of the whole cost of the whole amount of work done on the Western Division at the contract prices. We made a difference between the

value of the work done, and the engineeers' estimate of it found in the answer in this suit, which difference was $406,068, including the retained per centage, $477,341. In this calculation we estimated the prices at the contract rates, and the extra items we fixed at what we thought reasonable prices."

Transcript 220, 221, *p.* 398.

It is submitted that the evidence shows that the lease and mortgage to Chamberlain were fradulent.

6. The next question is, supposing the fact of fraud in the execution of the lease and judgment to be proved, is it competent for the complainant, the Minnesota Company, to ask relief for the fraud.

It is submitted that complainant is entitled to relief against the lease and judgment on two grounds:

(*a.*) First, as claiming under Barnes, who, as trustee for the bondholders, was a subsequent creditor.

The law as to the right of a subsequent creditor to complain of a fradulent transfer of the debtor's property is well stated in 1 *American Leading Cases, p.* 56, *in commentary on Thomas vs. Jenks,* 5 *Rawles,* 221, as follows: "An intent actually to defraud creditors is to be legally inferred from the grantor being insolvent at the time, or greatly embarrassed, or so largely indebted that his conveyance necessarily has the effect to hinder and defraud creditors, and a voluntary conveyance made under such circumstances may be set aside by a subsequent creditor." See further on this point—

Gilmore vs. N. A. Land Co., 1 Pet., C. C. 464.
Ridgeway vs. Underwood, 1 Wash., 137.
Howe vs. Ward, 4 Greenl., 208.
Hey vs. Niswanger, 1 McCord, C. R., 518.
Henderson vs. Dodd, 1 Bailey's ed. 140.
Taylor vs. Ex. of Herrot, 4 Dessaussure, 232.
Smith vs. Gear, 3 Humph. 121.
Morgan vs. McClelland, 3 Dev. 82.
Doyle vs. Sleeper, 1 Dana, 531.

In McConnike vs. Sawyer, 12 N. H. 403, the Court say: "That subsequent creditors may take advantage of the fraud,

* * is so generally the received doctrine, both in England and the United States, as to be no longer an open question."

See also, 1 Story's Eq., sec. 361.

(*b.*) The case of Bodley & Robbins vs. Goodrich, 7 Howard, 276, is conclusive of the fraudulent character of the lease and judgment in this case as against creditors. In that case the court held that "a deed of assignment to trustees in trust for creditors, which shows upon its face an intention to postpone all payment to the creditors to a future day, and in the mean time to have the funds used to build a railroad, which is in an unfinished state, was part of the property assigned, is void on its face, as against a creditor who did not assent thereto." The same deed was pronounced fraudulent against creditors by the Supreme Court of Mississippi in the case of Arthur vs. the Bank, 9 Smedes & Marsh, 394, and by the Supreme Court of Lousiana in Fellows vs. The Commercial & Railroad Bank of Vicksburgh, 6 Rob., 246.

(*c.*) The lease and judgment to Chamberlain are more objectionable than the deed of trust above adversely passed upon by the Supreme Court of the United States, Mississippi and Louisiana, for

It gives a preference to one creditor over all other creditors.

The evidence goes very far to show that the amount of indebtedness admitted to Chamberlain was false and fraudulent.

(*d.*) The evidence of Kilbourne shows that the lease and judgment were given to protect the property from the general creditors, and to enable the railroad to be completed.

(*e.*) It seems very clear then, as a doctrine of law, that the lease and judgment to Chamberlain are fraudulent as against creditors.

7. It is clear that Barnes was a subsequent creditor, and as the complainant claims through Barnes, the complainant is entitled to all the rights and equities of Barnes.

As a subsequent purchaser, the complainant also has a right to avoid the lease and judgment.

In Wadsworth vs. Haven, 3 Wend. 413, the Court say: "The defendant here was not only a subsequent creditor, but a purchaser for valuable consideration, and therefore, according to the third resolution in Twyne's case, had a right to avoid a precedent fraudulent conveyance."

Chautaque Co. Bank vs. Risley, 19 N. Y. 370.
Frakes vs. Brown, 2 Blkfd. 295.
Pennington vs. Clifton, 11 Md. 162.

As a subsequent purchaser, then, the complainant has a right to object to the lease and judgment as fraudulent.

8. In conclusion, we submit, therefore, that the Court has jurisdiction, and that both the lease and judgment are null and void as against the Minnesota and Milwaukee Company.

C. CUSHING.

APPENDIX.

Extracts from Mr. Carpenter's Brief in this Case in the Circuit Court of United States for the District of Wisconsin.

1. The testimony clearly shows an ABANDONMENT on his part of all claim under his lease on the part of Chamberlain.

Its terms required him to operate the road and apply the earnings (1) to the payment of interest on the mortgage debt of the Company, including the Bronson and Soutter mortgage on the Eastern Division, and (2) provided as follows:

"Whatever balance of said net receipts as aforesaid shall remain after the payment of said coupons and sinking fund, shall be" applied in payment of indebtedness now due and hereafter to accrue from said Company to said Chamberlain.

(See lease in evidence.)

While Chamberlain was in possession under this lease, the property, rights, franchises, causes of action and effects of the old Company of every kind and description, passed on the foreclosure of the Barnes mortgage to the Milwaukee & Minnesota Company, and the latter Company became "the successors in the interest of the La Crosse and Milwaukee Railroad Company and the owners and holders of the legal title to its road, appurtenances and franchises." Opinion of Justice Miller, 2d mortgage case. September term, 1864.

It thereafter became and was the duty of Chamberlain, (if his lease was still valid) to perform all its duties for the benefit of the Minnesota Company, as he ought therefore to have performed them for the benefit of the La Crosse Company.

Conceding the lease to be valid, it bound Chamberlain first to protect the property from the expense and risk of any foreclosure suits, and, second, to apply on his claims against the Company only such balance as might remain in his hands above the amount of such necessary payments. The

testimony shows (see p. 2 A. 3 A. printed testimony before Bloodgood) that, up to 1st December, 1859, Chamberlain had received—

Net Receipts		$556,014.86
That he had paid as follows:		
Palmer mortgage	$125,464.91	
City "	34,367.02	
Bronson & Soutter mortgage	119,400.00	
		279,231.93
Balance		$276,782.93

With this balance of $276,782.93 in his hands, he entered into an arrangement with Bronson & Soutter, the trustees of one of the mortgages, the interest upon which he was bound to keep down, and upon which there was but $40,000 of interest due, for an amicable (!) foreclosure of that mortgage, which would extinguish the title of the Minnesota Company to the Eastern Division franchises and rolling stock—nearly two-thirds in value of all that he was holding under his lease—and enable him, Chamberlain, to become the purchaser thereof, *in fraud of the rights he was bound by his lease sacredly to protect.* The arrangement between Chamberlain and the trustees, Bronson & Soutter, was under seal, and provided as follows: (See copy in evidence.)

"It is agreed that the proceedings to foreclose shall be conducted amicably so far as the parties hereto are concerned, *and that their respective counsel shall aid in carrying out the spirit of this agreement. A decree of foreclosure may be procured by the joint efforts of the counsel of both parties to secure, if practicable, the sale of said road and premises, subject to the mortgage or deed of trust hereinbefore mentioned, and with the view of giving and securing to said Chamberlain every facility in becoming the purchaser under such foreclosure,* (provided that nothing herein contained shall preclude the trustees from bidding at such sale for the protection of the interest of the bondholders.) The trustees will make no opposition to the establishment by said Chamberlain of his claims upon the said La Crosse & Milwaukee Railroad Company as next in order to said mortgage or deed of trust; and if this form of decree should prove impracticable, or be refused by the court

in which proceedings may be pending, the trustees will consent to any other form of decree which the counsel for the respective parties hereto may think best adapted to protect the claims and interest of said Chamberlain in the right of standing next in order to the said mortgage or deed of trust, securing, however, to the bondholders under the same, all their rights of priority.

"If the said Chamberlain shall become the purchaser of the road and property aforesaid under a decree of foreclosure and sale, the trustees will extend a credit of nine and twenty-four months upon so much of the arrears of interest as may remain due to the holders of the one million of dollars of the bonds of said Company, issued under and secured by the aforesaid mortgage or deed of trust, and be included in the decree of foreclosure and sale, not exceeding in amount two coupons in each bond, and receipt for the same to the officer making such sale as so much cash, taking from the said Chamberlain such reasonable security for the payment thereof and the interest thereon, at the rate of eight per cent. per annum, as may be satisfactory to the trustees, but such security shall be perfected by the said Chamberlain on or before the time of the making of such sale."

And afterwards, in pursuance of this amicable scheme, Chamberlain, on the 19th day of May, A. D. 1860, surrendered possession of all the Eastern Division, its rolling stock and appurtenances, to Bronson & Soutter, as mortgagees. (See Exhibits attached to Chamberlain's answer in this cause.) At the time of this surrender, there was but $80,000 due on that mortgage.

Nothing can be plainer than that this surrender was a clear violation of his duty and abandonment of his lease. He had his option at that time either to pay the $80,000 and thus stop the foreclosure suit, and take the chances of holding under his lease, or to abandon the property altogether to the creditors or owners; but he could not do both. His surrender was followed by the appointment of a receiver, who has ruthlessly squandered the funds; so that, to save this property from sale, the Minnesota Company must now raise and pay the money due on the mortgage, which it was his duty to have paid. When this payment is made, can he interpose his claim under the lease which he has thus aban-

doned and claim possession of the road as against the Minnesota Company? If he can, then he need never have paid any interest on the mortgages; he could have taken the earnings of the road until interest matured, then surrendered and compelled the Company to raise and pay the interest from other sources; and when paid he could have taken possession until another instalment of interest matured, and so on. In an opinion of Mr. Justice Miller, Sept. T., 1864, before quoted from, on our application for possession and the discharge of the receiver, he says:

"III. Mr. Chamberlain objects that he has a lien of over $700,000 on the road by judgment, and that he was in possession under a lease which gave him that possession as security for his debt, when the order appointing a receiver was made, which took it from him. If these facts were true, and his lease were unimpeached, or his debt conceded to be just, I should have no hesitation in discharging the receiver, to replace the property where the court found it on making the appointment, and as the matter is now presented to me, I have also no hesitation in saying that Mr. Chamberlain's objection to the discharge of the receiver is the only one which has deserved a moment's consideration. It is, however, not true that Mr. Chamberlain was in possession when the receiver was appointed. The terms of his lease required him (out of the proceeds of the road) to keep down the interest on the mortgage of the plaintiff in the suit. This he failed to do, and either *voluntarily, or because he could not help himself*, surrendered possession of the property to the plaintiff, some fourteen or fifteen days before the order appointing a receiver in the Howard case. This fact is conceded by all parties, and is distinctly proved by Mr. Dow in the principal suit, and shown by the accounts returned into this Court in that case. So that when the receiver was appointed in the Howard case, the property was taken by this Court from the plaintiffs in this suit, and not from Mr. Chamberlain. Again, it is urged that by the failure of Mr. Chamberlain to keep down the interest on the mortgages, and by his parting with the possession, he has abandoned his claim under that lease, and can no longer insist on the right to hold possession of the property as his security. I must confess that upon examining that lease in the light of this conceded fact, it is by no means clear to me that if Mr. Chamberlain should bring his action to recover possession, he would be entitled to it;

the consideration, or the main consideration has failed. *After permitting the property to be kept from himself and its owners now for four years, and subjected to all the hazards of sale and loss, it would seem that his right to its possession must have terminated at all events.*

"But I cannot shut my eyes to the fact, in an application like this, addressed in some sense to the discretion of the court, that Mr. Chamberlain's judgment, which was for the debt secured by the lease, stands upon a very doubtful basis as to its validity and justice. It is certainly true that a decree has been obtained against him, which is in full force, and unreversed, setting aside and vacating that judgment."

The testimony now before the Court shows that this surrender was made *voluntarily*, and while he was holding in funds received under his lease *more than three times the amount* due on the mortgage to which the surrender was made. The conduct of Chamberlain shows his own understanding that his lease and judgment had been destroyed by the Cleveland decree. Upon no other principle can his surrender be explained. If he regarded his lease as continuing in force, and its obligations still resting on him to pay this interest, his conduct was a most flagrant breach of trust, an outright act of dishonesty and fraud, which the Court is not to presume. The only theory of the subject at all reconcilable with the honor and integrity of Chamberlain is, that he surrendered because he knew that his lease had been annulled and all his rights under it extinguished; and this theory the Court, as an act of justice to Chamberlain, must now adopt.

But (2) passing the effect of Chamberlain's voluntary abandonment of his lease—if the validity of the lease and judgment are now to be considered as open questions—both must be declared null and void for reasons which are still to be given.

a. First.—There was when this lease was executed no law of Wisconsin authorizing a corporation to lease its road and franchises, and for want of such authority the lease is void.

Beman vs. Rufford, 6 E. L. & Eq. Rep. 110.

Winch vs. Birkenhead, &c., 13 E. L. & Eq. Rep. 516.

The Great Nor. vs. The East Ang., &c., 41 Eng. Ch. Rep. 306.
S. C., 7 Hare Rep. 306.
The New York & M., &c. vs. Winans, 17 How. 30.
Johnson vs. S. & B. R'y Co., 3 De Gex M. & G. 914.
London, &c., R'y Co. vs. L. & S. W. R'y Co., 4 De Gex & J. 362.

So strictly is this doctrine held that an incorporated company cannot form a partnership by which others are to be admitted to a joint control or participation in the profits of its undertakings.

Sharon Canal Co. vs. Fulton Bank, 7 Wend. 412.
S. & B. R'y Co. vs. London, &c., 4 De Gex M. & G. 115.

The attempt to draw a distinction between the right of the company to lease its franchise to exist, which it is conceded cannot be done, and its right to transfer its franchise to operate the road, which it is claimed can be done, is borrowed from a remark of Curtis, J., in

Hall vs. Sullivan R. R., cited, Redfield R'ys, p. 578.

But that case did not so decide; and the case

Peter vs. Kendall, 6 B. & Cres. 703,

cited by Judge Curtis to sustain this distinction, *did not involve this point*. In that case Peter had leased a ferry to Brown, but afterwards Brown had surrendered to Peter, and became his servant. It was objected that the action should have been in the name of Brown, the lessee, but the Court held that he, having surrendered, and become the tenant of Peter, the action was well brought; and the Court were not called upon to decide, nor did they, upon the validity of the lease to Brown. But Judge Curtis said in this opinion, that if compelled to decide the question, he should follow *Pierce vs. Emery*, 32 *N. H.*, 484, where it was held *that without legislative license, no transfer of the right to operate the road could be made*. It is impossible for a corporation to make a contract or conveyance by which it puts it out of its power to perform its duties to the public.

Clark vs. Washington, 12 Wheat. 40.
The N. Y., &c. vs. Winans, 17 How. 30.

As to the duty of the Courts to confine corporations to such powers as are expressly granted them, and not by implication enlarge those powers in favor of monopolies and against the public; see

C. J. Taney, Warren Bridge case, 11 Pet. 544.
Perin vs. Ches. & Del. C. Co., 9 How. 183.

b. To avoid this objection, it is claimed that this instrument is not a lease, as it purports to be, but is in legal effect a mortgage, and that by its charter and the laws of the State, the Company had authority to make a mortgage. To this it may be said (1st) that the authority to make a mortgage could only be exercised according to the manifest intention of the Legislature by giving a mortgage in the usual form, to be foreclosed on default by the Company. If the mortgage is so given *as to perform the office of a lease*, and give possession before condition broken, and for an indefinite term, then it is as illegal as a lease proper would be. What cannot be done directly, the law does not permit to be done indirectly.

The lease, whether *called* a lease or a mortgage, is obnoxious to all the objections taken in the cases above cited. It was a surrender and assignment of the rights and franchises which were delegated by the Legislature to the corporation, and might continue indefinitely without any default on the Company's part. The policy of the State as to railroads when this lease was executed was perfectly clear. They might be mortgaged, but upon such mortgage, after default, there must be foreclosure by *public sale*. By R. S. 1849, in force when this lease was given, it was provided, as to all mortgages, that in all cases for the foreclosure of mortgage, the Court, if the money was not brought into Court, should make decree for the sale of the premises, either in parcels or entire in certain cases. Chap. 84, sec. 88, 90. The proceeding of strict foreclosure was thereby in effect abolished. A mortgage on a railroad must therefore be fol-

lowed by a public sale, at which all the citizens could compete by bids for the property; and the Company could not, even by giving mortgage, secure the succession to the mortgagee. But this lease, or *this mortgage*, if that word is preferred, completely defeated this policy of the law. This railroad might remain a thousand years in the possession of Chamberlain and his heirs without any default on the Company's part, and without any opportunity given to the public to purchase the road and franchises. No matter what called, this instrument performed the office of an indefinite lease of the road; and for that reason was *ultra vires* and void. It was an act beyond the power of the Company to perform, and therefore void *ab initio* between the parties to it. The Company could at any time have set it aside, or disregarded it; and Chamberlain would have been without remedy.

See cases cited above from English Chancery Reports.

Angel & Ames, Corp., Sec. 111, 256, 258, 273, 391, 392, 393.

Bank of Augusta vs. Earle, 13 Pet. 587.

People vs. Utica Ins. Co., 15 J. 387.

Bank U. S. vs. Danbridge, 12 Wheat. 68.

Dartmouth College vs. Woodward, 4 Wheat. 368.

Madison &c. vs. Watertown Plank Road, &c., 7 Wis. 59.

This instrument is not a mortgage, or at least is not such a mortgage, nor given for such a purpose, nor in such form as contemplated by the Legislature. Chap. 78, Private Laws 1856, authorized the Company to make and issue its bonds, to be secured by a mortgage; but required the Company by resolution to prescribe "*the sum or sums* for which each of such bonds shall be issued, *the time or times*, and *place or places*, when and where the principal and interest of the same shall be payable; the person or persons, trustee or corporations to which they shall be payable; and whether payable to order, or to bearer, or how otherwise negotiable; the rate of interest which such bonds shall bear, and the manner and form in which they, and the interest coupons attached to them, shall be executed. *And to secure the pay-*

ment of any or all of said bonds, the La Crosse and Milwaukee Railroad Company are hereby authorized and empowered, in its corporate capacity, to make, execute, and deliver *a mortgage or deed of trust* upon the whole, or any part of its railroad, constructed or authorized to be constructed, or of any or all of their estate, real, personal, or mixed, in possession or expectancy; and the said Company is also hereby authorized and empowered, in and by such mortgage or deed of trust, to confer upon the trustee or mortgagee full and ample powers to enter in and upon, and to take possession of, have, use, and employ, or to sell and dispose of, the whole or any part of said railroad or estate, together with the functions appertaining to said railroad, and all corporate and other franchises, rights and privileges of the said La Crosse and Milwaukee Railroad Company."

This is believed to be the first act authorizing the Company to mortgage its franchises. And it is manifest what kind of a mortgage was contemplated by this act, viz: a mortgage to secure a fixed sum, payable at a fixed time. Such a mortgage the Company was empowered to make. But this lease has no resemblance to it; it is not for a fixed or certain sum; it is not payable at any particular time or place. It was putting the Company, the stockholders, and the public into Chamberlain's power completely. No one could know, without a litigation, the extent of his claim, or the amount to be paid for redemption. It was a complete departure from the policy of the law, *and* A LEASE, not a mortgage, of the property and franchises of the Company. The language of the instrument is conclusive, it is not a *grant* of the fee upon condition, but is expressed as follows: the Company "hereby *sells and conveys* to the said 'Chamberlain' all its personal property," &c., and the Company "hereby LEASES and LETS to the said 'Chamberlain,' from and after the thirtieth day of September, in the year 1857, *for an indefinite term of time*, to be determined in the manner hereinafter specified, its entire railroad," &c. Mr. Emmons, in some of his arguments, has claimed this lease to be a *Welsh mortgage*, which it resembles about as much as it does

a *Welsh rabbit*. A Welsh mortgage was a conveyance of the fee, upon the understanding that the rents and profits were to be received instead of the interest, until the mortgagor should pay the whole principal sum. This instrument is not a conveyance of the fee, but a *lease* for a *term;* and the rents and profits are to be applied to four different subjects before any application could be made by Chamberlain to his own claims, and then that application was to be made, not to pay the interest on a certain and definite sum of principal, but to the payment of what was due or to become due Chamberlain from the Company.

This instrument is a lease, and not a mortgage, and was executed without any authority from the Legislature; and was therefore *ultra vires* and void, even between the Company and Chamberlain; and upon this ground alone the absolute decree in the Cleveland suit was correct, and could not have been reversed on appeal. This is one of the grounds, as we have before shown, taken in the Cleveland, bill and must be presumed, from the record of that cause, to have been the ground upon which the decree rested. The Legislature never intended to authorize an instrument like this lease to be followed by immediate possession. Judge Ruffin, in Pointdexter v. McCannon, 1 Bad. & Dev. N. C. Eq. says: "No mortgagee or mortgagor ever yet made a contract, upon which the possession was to change immediately, unless it was the veriest grinding bargain that could be driven with a distressed man, who had no way to turn."

(*c.*) SECOND.—This instrument, whether lease or mortgage, was and is void as to all existing or subsequent creditors, in that it, by its very terms, hindered, delayed and defrauded creditors, by cloaking the property of the Company and applying the rents and profits to the exclusive benefit of the Company, making no provision for creditors.

The lease and the contract between the Company and Chamberlain of the same date, are to be construed together as parts of one entire transaction.

See testimony before Bloodgood, 3 A.

See the contract and lease in Cleveland record.

The testimony of Byron Kilburn as to the condition of the Company at this time, and the motive to give this lease is as follows:

"I was present, and acting in the board when the judgment was confessed in favor of Chamberlain, and when the lease was given to him. The lease was given previous to the judgment. The lease was given during the pendency of the suit with Cleveland. I think Mr. Chamberlain first proposed that the lease should be given to him *as the embarrassments of the Company grew more apparent.* Mr. Chamberlain, of course, grew anxious about his pay. When I went home in the early part of September, 1857, he expressed much uneasiness as to his security. He urgently requested of me to make him some specific security. This was about the first of September. He explained to me, at considerable length, the danger that he might not receive his pay for the work he was then doing; that he was expending a good deal of money, had a great many men at work, and had drawn largely on his means and the means of his friends. The Company was largely in arrears to him on the contract. *He had heard of dissatisfaction on the part of Vose, Livingston & Co., of whom he had purchased the iron, on account of not making payments to them, and that they threatened to reclaim the iron.* He wanted some assurance and security that he would receive his pay at some time, or else he would have to suspend his operations. He stated to me that he had urged this very strongly on the directors. He urged it very strenuously on me. He seemed to think he was incurring too large responsibilities on uncertainties. I told him on my part, on behalf of the Company, that I thought we had financial arrangements then made, by the issue of a million of second mortgage bonds, by which we could pay off his estimates, and that such security would therefore not be necessary at that time. In consideration of those views, I advised against it. I told him, that although I was willing to do anything to accommodate him, I was afraid that that would injure our credit and hinder us in raising funds. The result was that we did not go into it at that time. We gave him at that time, however, the assurance that if we should be disappointed in raising funds, we would give him all the security we could; that the great point with us was the completion of the road, and that we would protect him at all times as far as we could. In this he acquiesced, though urgent to the last that we should do as he desired. As we did not see fit

to do so then, his parting remark to me was that he should depend on us to see him safe against all harm. I told him that, from the prospect we then had, I thought we should be able to pay him $150,000 in the ensuing month, [September.] I left here on the fourth of September for New York. When I reached there, after an absence of about three weeks, I found that our prospects for raising funds from this source was very much diminished. I think we did not, in fact, pay him that month more than $15,000. I found, as September and October progressed, *that we were getting deeper into embarrassment, and that an association of bondholders was formed around us,* who were thwarting all our efforts, and I saw but one way *to save the road and secure its ultimate completion,* which was to make this lease to Mr. Chamberlain. When I became fully convinced of this, I returned home for this purpose. I had a great amount of anxious reflection, and came fully to this conclusion. I laid views before the board, who had come to the same conclusions before, and we went on and made the lease at the time and in the manner that the records show.

"Question. What dangers did you propose to guard against by giving the lease.

"Answer. I have already explained that fears were entertained of combinations of bondholders being formed sufficiently strong to counteract our efforts in raising money to meet our liabilities and progress with the work, and that danger of this had become so imminent, and was growing so apparent, that the only remaining hope for the continuance of work on the road seemed to be to give Mr. Chamberlain such a lien upon it as would assure the payment of what had already become due for work then done, as well as for that to be done under this contract. This was the great and paramount danger which threatened to overwhelm the Company, but there were other and nearer dangers threatening us, more immediately against *which it was equally necessary to guard. There had been one or two instances of attachment sued against the Company* for indebtedness to the amount of a few hundred dollars; and it seemed quite evident that by such means the Company's resources would soon be so exhausted *as to render it entirely powerless for further progress.* The floating debts of the Company amounted to perhaps some $300,000, in small sums, varying from a few dollars to some hundreds, and in some cases to a few thousands. If sued under attachments, under the influences of panic, as no doubt they would have been, would have effectually arrested

the progress of the work and prevented the completion of the road. These were the dangers against which the board felt it to be its duty to guard by every lawful means in its power.

"Question. When you represented the dangers to the directors on your return, what dangers did you state? and how did you propose, through the lease, to guard against them?

"Answer. This question is substantially answered by the foregoing answer. The board of directors fully comprehended the embarrassments of the times, and *the dangers which threatened a suspension of work on the road without being communicated by me*, and some of the directors had been anxious *as a safeguard to the Company*, to make the necessary liens at a much earlier period, and doubtless would have authorized it to be done in the latter part of August or the first of September, except for reasons assigned by me against it at the time.

"Question. At the time of giving the lease was the amount of indebtedness to Chamberlain known?

"Answer. No.

"Question. At the time was it agreed that judgment should thereafter be confessed?

"Answer. I do not think there was any distinct agreement that a judgment would be confessed by the Company for the amount due Chamberlain at the time of making out of the lease, *but it was the interest of the Company* to give him a perfect lien upon the road and its earnings, to *secure all indebtedness, past and accruing* under his contract *until the whole should be paid*, and such was one of the conditions of the lease, without reference to the specific amount.

"Question. Why did you not wait before giving the lease until you had ascertained the indebtedness?

"Answer. Because the amount of indebtedness at that or any other particular time was not a necessary element in the lease.

"Question. When did you first agree to give a judgment to Chamberlain, and why did you conclude to give it?

"Answer. There was no agreement, properly so speaking, to give Mr. Chamberlain a judgment, except the order made for that purpose by the board. This was on the day and at the time when the papers for that purpose were made out, which date I do not remember; but it can be ascertained by reference to those papers. *The reason why this order was made I understood to be in consequence of a doubt entertained by the counsel of Mr. Chamberlain whether some legal difficul-*

ties might not be raised as to his lease lien covering the iron not laid down on the road; and to avoid all questions in this respect, and, in fact, to render the transaction as regarded a lien as perfect as possible, and thereby accomplish the ends proposed to be secured by it, it was deemed advisable by the board, under advice of counsel, to give the force of a judgment in support of the previous lien *for the amount then reported to be due.*

* * * * *

"Question. Was Mr. Cleveland's claim included among those impending in view of the board? (Objected to.)

"Answer. *It was, I think, in common with others.* No such exclusiveness, however, was given to it as Mr. Cleveland states in his testimony before the investigating committee. I don't think Cleveland's impending judgment had any particular influence at that time. I can't answer for the rest of the board. *The New York reasons had much the most influence on my own mind.* I can't say that the matter was hastened by the pending claim of Cleveland. I don't know that it was. *It was rather a hurrying time with us; other matters were pressing.* I was only temporarily here, and in a hurry to get back to New York. My present impression is that Mr. Chamberlain first suggested the judgment to me. *It was founded on the opinion of his own counsel. It had particular reference to the iron which Vose, Livingston & Co. were endeavoring to reclaim, he understood.* I had simply one idea—to secure the road. I wanted first to secure the completion of the road; second, to protect the Wisconsin stockholders. These were the paramount considerations in my mind. Next my desire was to secure Mr. Chamberlain. This is the order of motives in my mind. I supposed Mr. Chamberlain's would be classed differently. He wanted, I suppose, first to secure himself. In order to secure these objects, *I deemed it certainly necessary to have the lease and the judgment before Cleveland should get a judgment.* Doubtless I explained my general views to the board. How far I mentioned them in detail I can't say. I can't say precisely what motives may have influenced them. Mr. Cleveland's claim may have been mentioned in the conversations between him (Chamberlain) and me. *There were some attachments then, and there was fear of more attachments every day. They would have hastened our operations without Mr. Cleveland's claim.* Mr. Cleveland's claim may have been spoken of between me and Mr. Chamberlain, but not in the way Mr. Clevland has stated, or I should have remembered it, *for I*

would not then have admitted to anybody that these motives influenced us to make the lease and confess the judgment. No such view was presented between us. The iron was to be devoted to the use of the road, and Mr. Chamberlain was to have the use of the road to secure him. The lease shows all this. There was nothing said between Chamberlain and me, I think, as to whether the iron was to be sold for his benefit, or laid on the road. I understood the agreement to be that the iron was to be laid on the road, and secured to the road for that purpose. This I understood was previously provided for in the lease. This was the scope and object of the arrangement with Chamberlain, I understood.

"I don't think he stated to me *what attorney* advised him that a judgment was necessary. It was within a short time—two or three days—after the lease was executed that the judgment was entered; the lease was executed within a month after I heard of it.

"Question. Was there any understanding at the time that Mr. Chamberlain proposed that the judgment should be given to him, that it should be used in any way inconsistent with the completion of the road?

"Answer. No. I had heard, prior to the conversation between Mr. Chamberlain and me, two months prior, that Vose, Livingston & Co. were going to attempt to reclaim the iron. I heard it in our office in New York. I think the commencement of that agitation was as early as the beginning of August, I don't know but sooner. *Probably Mr. Chamberlain's object in proposing the judgment was not only to protect him against Vose, Livingston & Co., but against Cleveland's claim.*"

In this condition of things, the Company leased to Chamberlain its entire property and franchises, for the purpose (1) of paying the interest due on its mortgages; and (2) to ensure the completion of its road, which was provided for by the simultaneous contract entered into by Chamberlain; *making no provision for the unsecured creditors of the Company.* In other words, a debtor corporation, in failing circumstances, for the purpose of continuing its business for its own benefit, makes an arrangement with Chamberlain to go on in his own name but for its benefit, and apply all the revenues of its property to its benefit, in defiance of creditors.

This is precisely the case which the statutes against fraudulent conveyances were intended to reach.

Chap. 6, 50 Ed., 3, passed in 1376, (2 Eng. St. at large, p. 202,) the first statute upon this subject, has a preamble reciting the evil to be remedied, as follows:

"Item, because that divers people inherit of divers tenements, borrowing divers goods, in money or in merchandize, of divers people of this realm *do give their tenements and chattles to their friends*, by collusion thereof, *to have the profits at their will*, and afterwards do flee to the franchise of Westminster of St. Martin le Grand, of London, or other such privileged places, *and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattles*, till the said creditors shall be bound to take a small parcel of their debt and release the remnant."

"It is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattles as if no such gift had been made."

The 13 Eliz., Chap. 4, (6 Eng. St. at large, 356,) recites: "For as much as not only the Queen's most excellent Majesty, but also divers of her Highness' good and loving subjects, * * may have, incur, and receive great loss and prejudice by reason of fraudulent and covinous conveyances * * heretofore made or hereafter to be made," &c., * * "which were or hereafter shall be meant by the parties making the same to be fraudulent," &c., * * * "*or else by the secret intent of the parties, the same be to their own proper use* and at their free disposition, colored nevertheless with feigned countenance, and show of words and sentences as though the same were made *bona fide* for good causes and upon just and lawful considerations. For remedy of which inconveniences, &c., be it ordained," &c., &c.

The attempt of fraudulent debtors, from the earliest time to the execution of this lease, has been to save their property from their creditors and apply it, or the rents of it, more or less directly to their own benefit. A debtor in a flourishing business, with property ample to pay his debts, falls into sudden, and he hopes, temporary embarrassment, and is unable to meet his pressing debts. He flatters himself that another year it will be better with him, or times will be easier and money more plenty; and if he can save his property till then, he can pay all and save something for himself and

family. All this is very well if the creditor will consent, but the debtor has no right to demand it. He may appeal to the creditor's mercy, but cannot demand delay as a matter of *right*.

Mr. Kilbourn seems to have thought that he was justified in his attempt to serve the interests of the stockholders, and secure the completion of the road, even in defiance of importunant creditors who were clamoring for their "ten thousand talents;" but he mistook the remedy. Instead of the lease to Chamberlain, he should have fallen down and besought his creditors *to have patience until he could pay them all.* Then perhaps they would have had "compassion on him;" if not, all that he had should have been sold. This stern dominion of justice is sanctioned by law and religion, by the statutes of men and the gospels of God. And when Mr. Kilbourn found this enterprise swelling beyond the means of the Company to execute; and when every legal effort had been made to sustain its drooping credit, he should have submitted gracefully to his fate. Instead of doing so, however, he combined with Chamberlain for the purpose of putting the property of the Company out of the reach of its creditors; resolving that the Company, "in high countenance" of the Chamberlain lease, should continue its business and complete its road. This was a violation of law and a fraud upon creditors; an attempt to continue control of its property as *matter of right*, which could in the then condition of its affairs, only be done by the permission and *indulgence* of its creditors. In view of the advantages Mr. Kilbourn hoped to secure to the Company directly, and indirectly, perhaps, to its creditors also, and judged by the lax morality of railroad scheming in general, his conduct may be regarded as consistent with personal integrity. It may be said he did wrong that good might result; and he may have thought that the good end would justify the bad means; but it is the business of a Court of Chancery "*to instruct the consciences of such men.*"

In this matter Chamberlain and the Company are *in like condemnation.* All men must be deemed to have intended

the consequences of their conduct. Here the thing done was a fraud upon creditors. As both Chamberlain and the Company intended to do what was done, they must both be deemed to have intended thereby to defraud creditors. By the contract Chamberlain agreed to complete the road for the Company; by the lease the Company agreed that the rents and profits, toll and income of its railroad and franchises [all the property it had] should, after paying interest on the mortgages, be applied to what was then due Chamberlain *and what should thereafter accrue to him under his contract of that date for the completion of the road.* This was intended by both parties; this was agreed upon; *this was a fraud upon creditors.* Chamberlain had a perfect right at that time, if the Company was then indebted to him, and unable longer to continue the construction of the road, to take any proper steps to secure his then existing indebtedness; but he had no right to couple the security of his debt with a contract to aid the Company to cloak its property and apply its earnings to the completion of the road; and his attempt to do so marks the whole transaction as a fraud upon creditors, and therefore he cannot, as against creditors, insist upon his lease and judgment even to secure his then existing indebtedness.

Though a purchaser may pay full value for property, yet if he knows it is sold to defraud creditors, the sale is void.

Gardner vs. Otis, 13 Wis., 460

Beales vs. Guernsey, 8 J., 446.

A sale on execution, issued on a valid, unpaid judgment, if intended to defraud creditors, is void. *Crary vs. Sprague*, 12 *Wend.*, 41. A debtor at the point of death makes conveyance to be applied, *part to the payment of bona fide debts*, part for the benefit of wife and children; *the sale is void altogether.*

Welcome vs. Batchelor, 10 Shep., 85.

A conveyance which creates a trust, *whether secret or avowed*, in favor of the grantor, renders the transaction void, even though there may be mingled with it provisions in favor of *bona fide* creditors.

Shaffer vs. Watkins, 7 Watts and Serg., 219.

Twyne's case, 2 Resolution: "Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it was provided that the said act shall not extend to any estate or interest in the lands, &c., goods chattels, made on a good consideration and *bona fide*, for although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* within the said provision which is accompanied with any trust," &c.

1 Smith Leading Cases, p. 1, and notes.

In *Pickstock vs. Lyster*, 3 *Maul and Sel.*, 317, an assignment was upheld, the Court saying: "*This was not a deed by which the party stipulated for any benefit to himself*, but all the property of the party is to be distributed among his creditors, including this creditor." In Holbird vs. Anderson, 5 T. R., 235, the Court, Lord Kenyon, say: "There was no fraud in this case, the plaintiff was preferred by his debtor Charter, *not with a view of any benefit of the latter*, but merely to secure a just debt."

Conveyances to secure future benefit, support, or maintenance are void.

Crane vs. Stickes, 15 Vert., 252.
Jones vs. Spear, 21 Vert., 426.

The slightest trust reserved in favor of the grantor is fraud upon creditors.

Colburn vs. Pickering, 3 N. H., 415.
Russell vs. Hammond, 1 Atkins, 16.
Mackie vs. Cairnes, 5 Cow., 566.
Barnes vs. Griffin, 2 Cow., 365.

This lease contained a provision as follows: "It is further mutually agreed that the said 'Chamberlain' may, if it shall be found for the interests of said Company, *buy additional rolling stock*, and appropriate the receipts of said railroad to the payment of the same." This provision alone would render the lease fraudulent as to creditors. Millions of dollars might have been expended, *if the interests of the Company*, not its creditors, required it.

In Owen et al. vs. Body et al., 5 *A. & Ellis*, 28, a tavern-keeper made an assignment to trustee for the benefit of creditors, by which the assignee *was to continue the business of the debtor*, and apply the proceeds, to carry on the business, keep up the stock in trade, purchase horses and carriages, and pay the surplus of profits to creditors; and to this end assigned all his tavern stand and property. The assignment was held void. In Barnum vs. Hempstead, 7 Paige, 568, it was held that an assignment, containing provision for future advances to the assignor, *or for future liability which the assignee might assume for him*, could not be sustained. The Chancellor said: "If I was satisfied that such was a fair construction of the instrument, I should not hesitate for a moment to declare it fraudulent and void *upon that ground alone; as such an attempt to secure a future credit and benefit to the assignors, by means of the assigned property, to the prejudice of their present creditors, could not be sustained in any Court.*"

But the most pertinent authority is Bodly vs. Goodrich, 7 How., 276, approving the decision in Arthur v. The Bank, &c., 9 Smedes & M., 394, where a conveyance from a banking and railroad Company was made to assignees, for the reason, as the assignment itself recited, "that an assignment of the property, debts and effects of the said corporation should at once be made for the benefit of its creditors, as will most effectually promote the interest of the creditors of the institution, and protect its debtors from loss and sacrifice; *and at the same time furnish means to finish and complete the railroad immediately, and to protect and secure to the stockholders of the road the franchises granted by the charter.*" Exactly the motives Mr. Kilbourn says actuated him in making the lease, and exactly the thing he attempted to accomplish.

The Court say: "Upon its face this deed shows an intention by the bank to postpone its creditors, *use the effects of the bank for the completion of the railroad*, pay the trustees enormous salaries, and make no dividend among the creditors of the bank until these objects were accomplished.

This was proposed to be done with the consent of creditors, and if that consent had been given, there could be no objection to the arrangement. *The motive avowed to complete the railroad*, the greater part of which had been made, *and by which an income would be secured for the benefit of the creditors and stockholders of the bank, would have been legal and perhaps wise, had the creditors consented.* But the plaintiff in the judgment under which the property claimed by the plaintiffs was sold, did not consent; consequently he was not bound by the deed of assignment. *It was fraudulent as against him and all other creditors of the bank who did not become parties to the deed.*"

It would be impossible ever to find two cases more nearly parallel than the one just quoted, and the one we are arguing. The motives the same, the means the same, the result the same. It is wholly immaterial by what instrumentality a corporation proposes to retain control of its property, and apply its earnings to the completion of its road, in defiance of creditors. *It is the thing itself*, and not the means of its accomplishment that the law forbids. Whether the corporation attempt this illegal result by means of a lease or a mortgage, is immaterial. *It cannot be done at all*, and one method is as bad as another. If creditors could be compelled by this corporation to lie by while it applied its earnings to the completion of its road, it would be very little satisfaction to them to know that this fraudulent result was accomplished, not by a lease, but by a "*Welsh mortgage.*" It is the thing itself, and not the manner of its consummation that is a fraud upon them; and any cover or device under which it is sought to be veiled, will be swept away and the rights of the creditors vindicated.

(*d.*) THIRD.—Where the whole transaction as it is embodied in writing between the parties shows the fraudulent intent—that is, where the thing contracted for *is itself a fraud upon creditors*; the question of fraud, though one of facts, *is for the exclusive determination of the Court*, and not for a jury, even in an action at law; and both parties to the contract are

charged with notice of, and are conclusively presumed to have participated in the fraudulent intent.

Hutchinson vs. Lord, 1 Wis., 286.

Keep vs. Sanderson, 2 Wis., 42.

(*e.*) FOURTH.—Can the Milwaukee and Minnesota Company, the purchaser at the Barnes foreclosure sale, take advantage of the fraudulent character of this lease?

After the giving of the lease, and while Chamberlain was in possession under it, *and pending the Cleveland suit*, the Company mortgaged all its railroad, property, real, personal, and mixed, actions, and causes of action, rights and franchises to Barnes, to secure bonds of the Company to the amount of $2,000,000, subject to all the mortgages on the road, specifying them, *but not subject to the Chamberlain lease.* This mortgage was foreclosed, and the purchaser is the Milwaukee and Minnesota Railroad Company. The bonds of the Company secured by this mortgage were made and issued in 1858, *but the greater part of them were used by the Company in payment of indebtedness existing before the lease was executed.* See deposition of Judd.

To the extent, at least, that these mortgaged bonds were passed to creditors of the Company in payment of indebtness existing at the date of the Chamberlain lease, the Minnesota Company can assert the right of vacating this lease, *as an existing creditor.* But I do not intend to pursue this subject further, as it is well settled by the authorities that subsequent as well as existing creditors may set aside any conveyance which on its face shows it was made to hinder, delay, or defraud creditors.

Barnes, the trustee in the mortgage, as representing the bondholders, is to be regarded as a creditor from the date of his mortgage. After its purchase at the foreclosure sale under that mortgage, the purchaser—the Minnesota Company—became entitled to assert as against all the world, its right in two capacities, (1) as a purchaser from the mortgagor, as of the date of the mortgage and to set aside any conveyance of the property obtained from the mortgagor by

fraud and deceit. *Dusen vs. Fink*, 15 *Pic.*, 449, *opinion by Chief Justice Shaw and numerous cases cited by counsel;* (2) its right as an assignee of the creditor, *and all the right a creditor has to set aside a conveyance made in fraud of creditors.*

Dusen vs. Fink, 15 Pic., 449.
Troup vs. Wood, 4 John, Ch. 228.
Buffington vs. Gerrish, 15 Mass., 156 and notes.

In Wadsworth v. Havens, 3 Wend., 413, the Court, speaking of the defendant, who had purchased property at his own execution sale, says: "The defendant here was not only a *subsequent* creditor, but a *purchaser* for valuable consideration, and, therefore, according to the third resolution in Twyne's case (3 Co., 83,) had a right to avoid a *precedent* fraudulent conveyance."

Chautaque Co. Bank vs. Risley, 19 N. Y., 370.
Frakes vs. Brown, 2 Blkfd., 295.
Pennington vs. Clifton, 11 Ind., 162.

The legal principle that a fraudulent conveyance is void as to creditors, and that they therefore may sell the estate, as though the conveyance had not been made, carries with it, as an inevitable result, that the purchaser at such sale may set aside the conveyance, which was void as to the creditor making the sale. This is the well established law upon this subject, and I know of no case which even ruffles the current of the authorities. Therefore, Barnes, as a creditor, by his foreclosure sale, vested in his purchaser—the Minnesota Company—all the right which he had to object to the Chamberlain lease as a fraud upon creditors.

2. The only remaining question (treating Barnes as a creditor only from the date of his mortgage) is, can a subsequent creditor set aside a conveyance actually fraudulent? This is clearly established by the authorities. Where the intent to defraud is clearly established in the making of the conveyance, the authorities are unanimous in holding that subsequent creditors may set it aside. Existing creditors are not *compelled* to do so, and may resort to and exhaust all the other property of the debtor; so that subsequent credi-

tors would have a right to complain if they could not in turn resort to the property fraudulently conveyed.

1 Story Eq., Sec. 361. "Where the conveyance is intentionally made to defraud creditors, it seems perfectly reasonable that it should be held void, as to all *subsequent* as well as all *prior* creditors, on account of ill faith."

The doctrine of the Supreme Court of the United States is, that a *mere* voluntary *bona fide* conveyance, by one not indebted at the time, is good against *subsequent* creditors; *but a conveyance made with a fraudulent intent as against existing creditors may be impeached by subsequent creditors.*

Sexton vs. Wheaton, 8 Wheat., 250.
Hinde vs. Longworth, 11 Wheat., 211.
Reade vs. Livingston, 3 John, Ch. 481.

See also sustaining the principle that a conveyance made with an actual fraudulent intent may be set aside by a *subsequent* creditor:

Smith vs. Lovell, 6 N. H., 67.
Paul vs. Crocker, 8 N. H., 288.
Wadsworth vs. Havens, 3 Wend., 411.
Clark vs. French, 10 Shep., 221.
Damon vs. Bryant, 2 Pic., 411.
Tremble vs. Turner, 13 Smedes & M., 348.
1 Story Eq. Jur., Sec. 361 and notes.
Thompson vs. Dougherty, 12 S. & Rowl., 448.
Jacks vs. Turne, 3 Desaussure, 1.
Beach vs. Catlin, 4 Day., 284.

In 1 Am. Lead. cases, p. 56, the law upon this subject is stated as follows: "An intent actually to defraud creditors is to be legally inferred from the grantors being insolvent at the time, *or greatly embarrassed*, or so largely indebted that his conveyance necessarily has the effect to hinder and defraud creditors, and a voluntary conveyance made under such cases may be set aside by a *subsequent* creditor;" and the following among other cases are cited:

Gilmore vs. N. A. Land Co., 1 Pet., C. C., 464.
Ridgeway vs. Underwood, 1 Wash., 137.

Howe vs. Ward, 4 Greenl., 208.
Iley vs. Niswanger, 1 McCord, Ch., 518.
Henderson vs. Dodd, 1 Bailey Eq., 140.
Taylor vs. Ex. of Heriot, 4 Desaussure, 232.
Smith vs. Gear, 3 Humph., 121.
Morgan vs. McClelland, 3 Dev., 82.
Doyle vs. Sleeper, 1 Dana, 531.

In McConnihe vs. Sawyer, 12 N. H., 403, the Court say: "That *subsequent* creditors may take advantage of the fraud and avoid the conveyance, is a principle stated in Smith vs. Lovett, 6 N. H., 67, and in Paul vs. Crocker, 8 N. H., 290; *and is so generally the received doctrine both in England and the United States as to be no longer an open question.*" See also Harrison vs. Cramer, 3 Clark., [Iowa] 543.

FIFTH.—The judgment was given, as the testimony clearly shows, only for the purpose of bracing up the lease, and to carry out the purpose sought to be thereby accomplished, and must therefore follow the fate of its principal.

Kilbourn, the president of the Company, testifies (p. 145 Cleveland record) that the judgment was given after the lease: *that Chamberlain had heard that Vose, Livingston & Co. were threatening to reclaim the railroad iron, purchased but not laid down, on account of its not being paid for;* and (on page 147) he says the reason for giving the judgment was, "*a doubt entertained by the counsel of Mr. Chamberlain whether some legal difficulties might not be raised, as to his lease lien covering the iron not laid down on the road;* and to avoid all question in this respect, and in fact, to render the transaction as regarded a lien as perfect as possible, *and thereby accomplish the ends proposed to be secured by it*, it was deemed advisable by the board, under advice of counsel, *to give the force of a judgment in support of the previous lien*, for the amount then *reported* to be due. And on page 149, he says: "I can't say that the matter was hastened by the pending claim of Cleveland. I don't know that it was. *It was rather a hurrying time with us. Other matters were pressing.* I was only temporarily here, and in a hurry to

get back to New York. My present impression is that Mr. Chamberlain first suggested the judgment to me. It was founded on the opinion of his own counsel. *It had particular reference to the iron which Vose, Livingston & Co. were endeavoring to reclaim, he understood.* I had simply one idea, *to secure the road.* I wanted first to secure the completion of the road: second, to protect the Wisconsin stockholders. These were the paramount considerations in my mind."

* * * * "Mr. Cleveland's claim may have been mentioned in the conversation between him, Chamberlain, and me. There were some attachments then, *and there was* a fear of more attachments every day. They would have hastened our operations without Cleveland's claim." And on page 151, he testifies that it was not the understanding that the judgment was to be used in any way inconsistent with the completion of the road; and that Chamberlain sought the judgment to protect him both against Vose, Livingston & Co., and against Cleveland's claim.

From this testimony it is perfectly evident that if the lease was fraudulent, the judgment which was sought and confessed only to accomplish the end proposed by the lease is void also. If that lease is not void, I do not think this judgment, or any other judgment, lease, conveyance, or other device of a failing debtor, to secure his property from his creditors, ought ever to be set aside. Yet, in some respects, the judgment is even wore than the lease, if that be possible. Vose, Livingston & Co. were creditors of the Company, having sold a large amount of railroad iron, and were about asserting their right to reclaim the iron. Chamberlain's counsel feared that the lease might not defeat them, hence advised this judgment. Chamberlain communicating the fear of his counsel, sought the judgment for that reason. In other words it was sought and confessed, only to hinder, defeat, and defraud Vose, Livingston & Co.; and to brace up the fraudulent purpose of the lease, to secure the completion of the road in defiance of creditors.

But again, this judgment is shown to be fraudulent in this, that no such sum was due Chamberlain.

The circumstances surrounding the giving of this judgment, the failing circumstances of the Company, the attachment suits hourly expected, Cleveland's suit on trial, the organization of bondholders in New York, the "hurrying times" and "anxious reflections" of Mr. Kilbourn, the anticipated suit of Vose, Livingston & Co. to reclaim the iron, and thus perhaps make it impossible for the Company and Chamberlain to complete the road, the confession of the judgment for over six hundred thousand dollars, without suit brought, on the hap-hazard estimate of the engineers, *conceded by both parties to be erroneous*,—all tend to satisfy the mind that this judgment was given for a fraudulent purpose, and corroborate the testimony of Kilbourn (which by the way needs no corroboration, for it is uncontradicted by any witness in the case.)

The testimony of Edgerton and his party of engineers who measured parts of the work, and whose testimony is in the Cleveland record, and the full circumstantial measurement and estimate of Hugh Lee (testimony printed) of such items as could be accurately measured, conclusively establish that the amount of that judgment was jumped at in haste and in fraud, and that Chamberlain never had any such amount of just claim against the Company.

The following abstract of exhibit attached to the deposition of Hugh Lee, not printed, shows the pretended amounts allowed, and the true amounts of work done as to certain items of the Chamberlain work that are now capable of accurate measurement. If, as to the items which can be verified, such discrepancies exist, the balance of the judgment may be presumed not to be more accurate or honest.

ITEMS OF WORK.	Actual am't at contract price.	Am't included in Judgment.
1. Ballasting from Beaver Dam to Portage,....	30,642 00	77,016 00
2. Filling at Fox Lake.....	5,453 00	20,768 68
3. Grubbing and clearing between Portage and Lisbon.....	8,586 00	24,000 00
4. Solid rock between Portage and La Crosse	22,668 00	118,250 00
5. Road crossings.....	650 00	11,700 00
6. Bank wall.....	466 60	10,050 00
7. Ballasting, Portage to Lisbon.....	14,891 20	90,500 00

The foregoing is a sufficient sample of the whole. The prices in both estimates are the same, fixed by the contract, the difference being as to the amounts done, and can leave no doubt of the fraudulent character of the judgment in this respect.

(*b.*) There is another remark to be made of this judgment, that is, it is not a lien on the railroad, rolling stock and franchises in question, even conceding its validity.

As it is well settled that a corporation cannot dispose of its franchises, nor so dispose of its property as to put it out of its power to perform the public duties which constituted the inducement or consideration for its creation, without permission of the Legislature, it follows that this can only be done in the *manner* authorized by the Legislature.

Permission has been given to railroad companies, by the statutes of Wisconsin, to dispose of their roads and franchises by mortgage, and in no other way; and it has been provided that in case of foreclosure of any mortgage, the purchaser of the whole or any part of a railroad may have and exercise the franchises of the Company, so far as they "relate and appertain to the road conveyed," and are described in the mortgage. Without this permission, either expressly granted or implied, from the fact that the Company was authorized to make a mortgage, the purchaser would acquire no right to operate the property and franchises. The Legislature in this State having regulated this subject, and provided the method by which this right may be acquired, it follows that all other means are excluded. And it may safely be asserted that in no way but by a purchase at mortgage foreclosure sale can these rights be acquired. Liens of judgments exist only by force of statutory provisions, and judgments rendered in the Federal Courts owe their quality of being liens solely to State statutes.

Massingell vs. Downs, 7 How., 760.
Williams vs. Benedict, 8 How., 107.
Bank of Tennessee vs. Horn, 17 How., 157.

The statute, indeed, makes judgments liens upon the real estate of the debtor. But what is real estate for the purpose of receiving the lien of a judgment must be so for the purpose of sale to satisfy the judgment, and it is now pretty generally conceded that railroads cannot be sold on execution. It is certain that franchises cannot be; and without the franchises the right of way held by the Railroad Company, only to be used as and for a railroad, would revert to the owners, when, from want of power to use it, it should cease to be used for that purpose. The purchaser then would only acquire the title of the Company to the iron and ties and the rolling stock. This would be such a ruinous sacrifice of the property of the debtor, without any corresponding advantage to the creditor, as justice forbids.

Conceding Chamberlain's judgment to be valid, he might, by a creditor's bill, prior to the foreclosure of the Barnes mortgage, have acquired an equitable lien upon the tolls of the Company, which would have been protected.

Covington Draw Bridge case, 21 How., 112.

But this he did not attempt, and since the fee has passed from the old Company, it is now too late for him to do so.

But I do not propose to dissect further, the dead and corrupt bodies of this annulled lease and vacated judgment. If the district judge were permitted to select, from the many decrees rendered by him as a Chancellor, one to take up to heaven as a sample of his judicial action, I am certain he would select the Cleveland decree. And as all the testimony which was then before him in the Cleveland suit is now before your honors here, strengthened a hundred fold by other considerations not involved in that suit, we cannot here doubt the result. Even if your honors deny us all benefit of the Cleveland decree, the same testimony which procured that decree must be followed by a similar result here. The testimony which was satisfactory in 1859, to establish that the lease and judgment were given and rendered in 1857, with a fraudulent design, must have equal potency and be followed by the same decree when offered in this suit in 1865.

3. The Milwaukee & Minnesota Railroad Company brought a suit in equity against S. Chamberlain, in this Court, setting up its title as here stated, the lease and judgment to Chamberlain, the Cleveland decree vacating the lease and judgment, and averring that Chamberlain continued in possession after the Cleveland decree, and received over two hundred thousand dollars from the earnings of the road; *and prayed* that Chamberlain might be compelled *to account with the complainant for that sum.* This was the *only object of that suit.* As a consequence of the fact that the Judges of this Court disagreed about everything relating to this road, a demurrer to the bill was sustained and the bill was dismissed *pro forma*, and is now pending in the Supreme Court on appeal. It was never argued or heard in this Court, and neither Judge has ever expressed an opinion upon its merits.

The objection of this suit is wholly different, viz: *to compel Chamberlain to cancel, on the respective records thereof, his lease and judgment, so that the same may no longer be or appear of record, to be liens or incumbrances upon the property of the complainant.*

(*a.*) Therefore the former cause is no bar here. In that cause the Court might have been with us upon every point involved in this bill, and yet dismissed that suit upon some other ground.

The test whether a decree dismissing one bill will bar another, is not whether some of the evidence in one was also applicable to the other, *but whether both suits are framed to attain the same results.* Here the object of this bill could not have been decreed, was not asked in that suit, and the object for which that suit was prosecuted, is not prayed for in this suit. Therefore the decree dismissing that bill is no bar to the bill in this cause. Had there been a hearing on the merits in the former suit, and facts found by the Court in favor of Mr. Chamberlain, that finding might be conclusive. But that not having been the case, they can only rely upon the decree sustaining the demurrer and dismissing the bill, and to make that a bar, the object for which both suits are prosecuted

must appear to be the same. This is the doctrine of all the authorities.

Story Eq. Bl., 790, 791.

(*b.*) The appeal suspends the effect of the decree, so that for that reason also, it is no longer a bar, even if that bill had been for the same relief. By the rule of the English Courts of equity, prior to the revolution, and at the time the Supreme Court of the United States adopted the English Chancery rules of practice, an appeal had the effect to suspend the decree appealed from. The appeal took up the whole case, and it was to be heard *de novo;* not to correct errors in the decree merely, but to make such a decree as the case called for.

Green vs. Winter, 1 John, Ch. 77.

2 Dallas, 413.

Following this rule, the Supreme Court of the United States holds that an appeal has the same effect in all cases where an appeal is the proper remedy.

Yeaton vs. U. S., 5 Cranch, 281.

Sch. Rachel vs. U. S., 6 Cranch, 329.

Corning vs. Troy Iron Co., 15 How., 451, 466.

The Court say, "When the decree is either affirmed or reversed, *it becomes the decree of that* [the appellate] Court."

The Supreme Court has even held that a petition for rehearsing suspends the decree, *and that for that reason there is no final decree in the cause,* until the petition has been disposed of.

Brockett vs. Brockett, 2 How., 238.

4. This suit is in favor of the Minnesota Company, a corporation of this State, and an order was made in haste and without reflection on the part of counsel or consideration on the part of the Court, allowing the St. Paul Company, also a corporation of this State, to intervene and file cross bill. Thereupon that Company, without any leave for that purpose, *filed an answer to this bill,* and exhibited a cross bill setting up certain statement of facts, and praying certain relief as against the complainant.

There is no doubt that, under the circumstances of this case, such order was erroneous, and this Court can have no jurisdiction as between these Companies; and therefore in the final decree in this cause, the cross bill and the intervention of the St. Paul Company should be dismissed for want of jurisdiction. *But this is a matter of no practical importance, as none of the averments of the cross bill are established by proof, except the dismissal of the former bill,* and the time to take testimony having expired, and the cause having been fully heard and submitted, no further testimony can be taken, and the cross bill must be dismissed on its merits.

Friday
Feb. 4. 1868

United States Supreme Court.

December Term, 1867.

43, 62. Milwaukee and St. Paul Railroad Company, Appellants, vs. James T. Soutter, Survivor, &c.

161. Milwaukee and St. Paul Railroad Company, Appellants, vs. James T. Soutter, Survivor, &c.

218. James T. Soutter and Shepherd Knapp, Survivors, &c., Appellants, vs. The Milwaukee and Minnesota Railroad Company.

219. The Milwaukee and Minnesota Railroad Company, Appellants, vs. The Milwaukee and St. Paul Railroad Company.

Brief for Milwaukee and Minnesota Railroad Company.

C. CUSHING,
Counsel for Milwaukee and Minnesota Company.

McGill & Witherow, Printers, Washington, D. C.

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Supreme Court of the United States.

DECEMBER TERM, 1867.

Nos. 43, 62. MILWAUKEE AND ST. PAUL RAILROAD COMPANY, APPELLANTS, *vs.* JAMES T. SOUTTER, SURVIVOR, &c.

161. MILWAUKEE AND ST. PAUL RAILROAD COMPANY, APPELLANTS, *vs.* JAMES T. SOUTTER, SURVIVOR, &c.

218. JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS, &c., APPELLANTS, *vs.* THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

219. THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT, *vs.* THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY.

BRIEF FOR MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

I.—INTRODUCTORY STATEMENT.

All these cases bring up the question, in one form or another, of the right to certain rolling stock of the La Crosse Railroad, now in controversy between the Milwaukee and St. Paul Railroad Company, and the Milwaukee and Minnesota Railroad Company.

Nos. 43 and 62 are the numbers 182 and 212 of the last term, which were then argued, but remained undecided, and come up again in that attitude at the present term.

No. 161 is a new case of this term on exceptions of the Milwaukee and St. Paul Company to reports of the auditor

on the accounts for the use of the above-mentioned rolling stock by the said Milwaukee and St. Paul Company.

Nos. 218 and 219 are new cases of this term, on supplemental bill and cross bill, putting in issue directly the same rolling-stock question between the above-named companies.

We refer to the briefs of the last term, in Nos. 182 and 212, and also in Nos. 159 and 203, for exposition and argument of the rolling-stock question generally, as well as of the particular questions involved in the cases Nos. 43 and 62 of the present, and Nos. 182 and 212 of the last term, they being filed herewith as supplements.

And we proceed now to separate exposition of the matters in No. 161 of this term, and Nos. 218 and 219 of this term.

II.—Statement in No. 161.

1. The appeal in this case is by the Milwaukee and St. Paul Company. It brings up, for the determination of this court, the exceptions taken by the St. Paul Company to the reports of the auditor, H. S. Palmer, filed respectively August 30, 1865, and April 16, 1866. (Transcript, No. 161, p. 175.)

To the report of the said auditor, filed August 30, 1865, the St. Paul Company filed the following exceptions:

(*a*) To the finding of the auditor, "that the whole value of the rolling stock on the road of the Milwaukee and St. Paul Company, and on the Eastern Division of the La Crosse and Milwaukee railroad, from February 28 to and including July 31, 1865, was $1,201,258 65."

(*b*) To the finding of the auditor, "that of the aforesaid rolling stock, the value of $695,295 14 thereof belonged to the owners of the Eastern Division of the La Crosse and Milwaukee railroad."

(*c*) To the finding of the auditor, "that the Milwaukee and St. Paul Company should be charged for the use of rolling stock belonging to the owners of the Eastern Division, on its road, from the 28th day of February, 1865, to and including the 31st day of July, 1865, the sum of $93,647 15."

(*d*) To the finding of the auditor, "that the sum of $33,094 51 is due the receiver from the Milwaukee and St. Paul Company, for the use of rolling stock belonging to the owners of the Eastern Division of the La Crosse and Milwaukee railroad, on the road of the Milwaukee and St. Paul Company, from February 28, 1865, to July 31, 1865."

2. These exceptions all involve the one important question—the great question of controversy between the two companies—what share of the rolling stock of the La Crosse and Milwaukee Company became the property of each of the companies respectively?

The auditor, in making up his report, assumes that, according to the land grant mortgage decree, the St. Paul Company acquired only forty box-cars; he therefore allowed only that share of the rolling stock to the St. Paul Company, and all the residue to the Milwaukee and Minnesota Company. See the evidence of Erastus A. Patterson, (Transcript, Nos. 218 and 219, p. 491,) and Exhibit 3, furnished by him, (Ibid, p. 498,) which proves that he divided and valued the rolling stock, his division and valuation being accepted by the auditor as correct.

2. We maintain that the auditor was right in assuming that the St. Paul Company only acquired forty box-cars of the old rolling stock.

This matter of the rolling stock has been frequently before the court, and, as we consider, always decided as understood by the auditor.

3. A brief reference to the previous adjudications upon the subject will be, it is submitted, sufficient to dispose of unfounded pretensions of the St. Paul Company.

In the suit to foreclose the mortgage on the Western Division, under the proceedings in which the St. Paul Company purchased its road known as the Western Division, previous to the order of sale, a reference was ordered to ascertain the whole amount of rolling stock on the road, and the quantity included in the mortage of the Western Division. (Transcript, No. 161, p. 99.)

In the Eastern Division cause a similar order of reference was made, to ascertain the quantity of rolling stock included in the mortgage of the Eastern Division.

The masters made their report as follows:

"*Western Division cause.*—We have ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, $569,635 78, and an additional amount of $53,600 has been purchased since the filing of the bill, making the whole amount to $623,235 78.

"And we have ascertained that of the said rolling stock forty box-cars, amounting, at the cost price thereof, to $31,979 64, are covered by the mortgage executed to the complainants, and all the remainder of said rolling stock is covered by the first mortgage upon said road, and in the mortgage upon said road executed to Green C. Bronson and James T. Soutter, and bearing date August 17, 1857." (Transcript, No. 161, p. 99.)

In the Eastern Division cause.—The masters make the same report as to the amount of stock on the road, valued at $623,235 78. They further report that the same forty box-cars are covered by the mortgage on the Western Division; and they add, "All the remainder of the said rolling stock is included in the first mortgage upon the said railroad and in the complainant's mortgage." (Transcript, No. 161, p. 100.)

4. This report, which gave to the Western Division but forty box-cars, was excepted to by the complainants in that cause, upon the ground that it ought to have given all the rolling stock, and was excepted to in the Eastern Division cause, because it ought not to have given the Western Division even the forty box-cars. But the court overruled both sets of exceptions, and made its decree in the western cause for the sale of that division and the forty box-cars. (Transcript, No. 161, p. 100.)

Under this decree, ordering sale of the Western Division and the forty box-cars, the St. Paul Company became the purchaser, and their title is derived from that sale, and can-

not include more than the decree ordered to be sold. (Transcript, No. 161, p. 100.)

5. In July, 1865, the court below ordered, on a mandate from this court, that upon the Milwaukee and Minnesota Company paying to the complainant a certain sum of money due on their mortgage, the receiver, then in possession of the Eastern Division of the road, and the St. Paul Company, also in possession, deliver the road to the Milwaukee and Minnesota Company, "together with all the rolling stock that was on the whole of the La Crosse and Milwaukee Railroad, or belonged or appertained thereto, when the said receiver was appointed, except forty box-cars numbered * * *; and also deliver to said Milwaukee and Minnesota Railroad Company such proportion of the rolling stock that was purchased by the receiver as $121,178 bears to $26,199." (Transcript, No. 161, p. 101.)

This order, founded upon the mandate of this court, was a conclusive determination of the question as to the rolling stock between the two companies, and should, it is submitted, end the controversy, as they were both parties to the suit in which this order was made.

6. Further, in the case of the Milwaukee and Minnesota Railroad Company *vs.* James T. Soutter, survivor, &c., to which cause the St. Paul Company was a party defendant, Mr. Justice Miller, delivering the opinion of this court, says: "We do not think that they (the proceedings) confer title to the rolling stock on the Milwaukee and St. Paul Company, * * except as to the forty box-cars, and the proportion of the stock purchased by the receiver which the net earnings of the Western Division bore to the net earnings of the Eastern Division." (Transcript in Nos. 218, 219, p. 169.)

7. It is confidently submitted that the auditor was correct in the assumption that all the rolling stock of the La Crosse Company belonged to the Milwaukee and Minnesota Company, except the forty box-cars assigned to the St. Paul Company.

The exceptions all go upon the assumption that the auditor erred in only assigning the forty box-cars to the St. Paul

Company. If he was right in this, the exceptions have nothing to rest upon. It is not considered necessary, therefore, to consider them more specially in detail.

In the report of the auditor, filed April 16, 1866, the St. Paul filed exceptions of precisely the same character as those we have been considering. (Transcript, No. 161, p. 174.) They raised exactly the same question, whether the auditor was right in holding that the St. Paul Company were entitled only to the forty box-cars, and the Milwaukee and Minnesota Company to the balance of the rolling stock. Having considered this question already, it is not thought necessary to add anything further upon it.

III.—Statement in Nos. 218 and 219.

1. The appellant, the Milwaukee and Minnesota Railroad Company, by their first bill filed in this cause, in the nature of a supplemental bill, set forth the different mortgages on the La Crosse and Milwaukee railroad; the foreclosure of the Barnes mortgage, and organization of the present company, the appellant, and its ownership of the equity of redemption, and all the road, rolling stock, and franchises of the old La Crosse and Milwaukee Company; the foreclosure of the land grant mortgage over the Western Division of the old La Crosse and Milwaukee Road; the marshal's sale, and its confirmation. It alleges that the land grant mortgage of the Western Division left unmortgaged over half a million of dollars in value of this rolling stock, and that the decree of the court did not order this rolling stock (except forty box-cars) to be sold; that the district court only placed this rolling stock in possession of the St. Paul Company, as it did the Eastern Division of the road, for the purpose of enabling that company, for the public convenience, to run the road from Milwaukee to La Crosse as one road.

The bill also charged that no proceeding had been had in the land grant cause, or otherwise, to ascertain the relative proportions of the net earnings of the Eastern and Western Divisions, so as to determine what proportion of the rolling stock purchased by the receiver passed under the land

grant mortgage sale; that the St. Paul Company, being in possession of the whole road and rolling stock, claimed ownership of nearly all the rolling stock.

The bill is filed as "supplemental" to the land grant foreclosure cause, and claims the benefit of the proceedings in that cause, praying that the Milwaukee and Minnesota Company may be decreed to be the owner of all the rolling stock on the road at the time of the appointment of the receiver, except forty box-cars; that an account may be taken to ascertain the relative earnings of the two divisions; and that, therefore, according to the principle of and basis of said land grant decree, it may be adjudged and definitely determined by the court what proportion of rolling stock purchased by the receiver belonged to the Minnesota Company and to the St. Paul Company respectively; and that a separation of said stock purchased by the receiver may be ordered. It prays also a proper allowance for rent for the use of the rolling stock on the Western Division, and that the avails may be applied to the interest on the mortgage, and for other and general relief.

To this bill the St. Paul Company demurred, because the parties were citizens of the same State, and the bill was not supplemental, and for want of equity.

The demurrer was sustained in the court below, and the bill dismissed.

From this decree an appeal was taken by the present appellant to the Supreme Court of the United States, and at December term, 1864, the appeal was heard and determined. This court, among other things, held that:

"The title of the appellant (the Minnesota Company) is clear on the record, unless it has been divested by those proceedings, (proceedings in the foreclosure suits.) We think they do not confer title to the rolling stock on the Milwaukee and St. Paul Railway Company, nor divest the appellant, except as to the forty box-cars, and the proportion of the stock purchased by the receiver, which the net earnings of the Western Division bore to the net earnings of the Eastern Division; and that they also decide that the

mortgage under which they claim did not include any more." The order of the circuit court sustaining the demurrer and dismissing the bill was reversed, and the case remanded for further proceedings not inconsistent with the opinion of this court. (2 Wallace, 641.)

Thereupon the mandate of this court was sent down to the circuit court, commanding the circuit court to proceed in the cause in conformity to the opinion of this court. (No. 219, Transcript, pp. 1, 2.)

2. Afterwards, in the circuit court, the Milwaukee and Minnesota Company, May 1, 1865, amended its bill by charging that the Milwaukee and St. Paul Company was insolvent, and that any decree rendered against said company for money would be worthless. (No. 219, p. 5.)

3. The Milwaukee and St. Paul Company, May 24, 1865, filed their answer, insisting that the foreclosure sale and organization of the Milwaukee and Minnesota Company, under Barnes's mortgage, was fraudulent and void, and the said Milwaukee and Minnesota Company did not become a corporation under the laws of the State of Wisconsin, and is not the successor of the La Crosse Company.

The answer also insists that the land grant mortgage embraced all the rolling stock, and had a prior lien thereon; that the marshal sold all the rolling stock under the decree in the land grant mortgage cause; that exceptions were taken to the marshal's sale, and were overruled by the district court; that this action of the district court is a conclusive adjudication against the claim of the Milwaukee and Minnesota Company to the rolling stock.

Insists that, as the Western Division did not sell for enough to pay the amount due on the bonds secured by the mortgage, the balance due constitutes a debt against the La Crosse and Milwaukee Company, and that this indebtedness belongs to defendant.

Admits that there have been no proceedings to ascertain the comparative net earnings of the Western and Eastern Divisions.

Admits there has never been any division of the rolling

stock, but denies that the defendant is indebted to complainant for the use thereof, and claims that the Eastern Division is indebted to the Western Division for the use of the rolling stock.

Claims the right to operate a different line of railroad from Milwaukee to Portage City, than the Eastern Division.

Admits that it is using a part of the rolling stock on Western Division. Denies that it is insolvent. Insists that Palmer, Soutter, La Crosse and Milwaukee Company, City of Milwaukee, and J. A. Helfenstein should be made defendants. (Nos. 218, 219, Transcript, p. 5.)

4. Answer of Soutter and Knapp insists that the rolling stock was included in the land grant mortgage; that it should have been included in the decree of foreclosure and sale, and if it was not included it was a manifest mistake.

5. September 20, 1865. Order granting leave to Soutter and Knapp to file a cross bill.

Cross bill filled by Soutter and Knapp sets forth the bill filed in this cause by the Milwaukee and Minnesota Company; that complainants, Soutter and Knapp, believed the mortgage to them, of 21st December, 1856, included all the rolling stock of the La Crosse Company; that, after the giving of said mortgage, some doubt arose as to whether said mortgage embraced all the rolling stock; that to settle this doubt the La Crosse Company, September 4, 1857, executed a supplemental mortgage to these complainants, embracing all the rolling stock and other personal property of the company.

That by inadvertence no reference was made in the proceedings for foreclosure of the mortgage to complainants, of December 31, 1856, to the supplemental mortgage of September 4, 1857.

That the property sold under foreclosure of complainants' mortgage failed to sell for enough to pay the bonds intended to be secured by said mortgage; that there was a deficiency of $1,129 01, which is still due to complainants.

That the supplemental mortgage of September 4, 1857, is still in full force, and complainants are entitled to have the same foreclosed to pay the balance due.

Prays that all the rolling stock may be held to be included in the mortgage of December 31, 1856, and that the Milwaukee and Minnesota Company may be decreed to pay to complainant due on said bonds, or the mortgaged property sold, and for general relief. (Transcript, Nos. 218, 219, p. 51.)

6. Amendment of answer of Soutter and Knapp; no new matter; change in form of statement. (Ibiden, p. 60.)

7. Amendment of answer of St. Paul Company, states the supplemental mortgage to Bronson, Soutter, and Knapp; that by virtue of this supplemental mortgage all the rolling stock vested in the said mortgagees; insists that if the defendant did not become the owner of the rolling stock by virtue of the foreclosure and sale under the land grant mortgage, yet the defendant, as *cestui que trust* of Soutter and Knapp, and owner of nearly all the bonds secured by said mortgage, and in possession of the rolling stock, is entitled to be treated as mortgagee in possession, and its possession cannot be questioned by complainant, except on a bill to redeem said property. (Transcript, Nos. 218, 219, p. 66.)

8. Motion of Milwaukee and Minnesota Company to strike cross bill of Soutter and Knapp from the files. (Transcript, p. 75.)

9. Answer of Milwaukee and Minnesota Company to the cross bill of Soutter and Knapp.

Admits filing of supplemental bill by this defendant. Denies that the mortgage to Bronson, Soutter, and Knapp, of December 31, 1856, included all the rolling stock. Avers that the supplemental mortgage was intended as a fraud on the creditors of the La Crosse Company; that the supplemental mortgage was never recorded, as the laws of Wisconsin require. That the supplemental mortgage was upon the same trusts as the mortgage of December 31, 1856.

That in the foreclosure suit of the Eastern Division, such proceedings were had as adjudicated the question of the rolling stock, whereby it was determined that all the rolling stock belongs to this defendant except forty box-cars, and also fixed the proportion of rolling stock purchased by the receiver which belongs to each company; that said adju-

dication between this defendant and the St. Paul Company is a binding judgment of the court, and defendant insists upon it as conclusive.

Insists on the proceedings and adjudication in the suit for the foreclosure of the mortgage of the Eastern Division, ascertaining the amount due to the complainants, Soutter and Knapp, as a perfect estoppel against the claims set up in the cross bill.

That the proceedings had in the foreclosure suit of the Eastern Division, under which defendant paid over $467,000, were with the knowledge and consent of the St. Paul Company, and defendant insists that by virtue of said proceedings the said Soutter and Knapp, and the St. Paul Company, are estopped from questioning the correctness of said decree under which defendant paid said large sum of money, which has been disbursed to the said St. Paul Company, its officers and agents. (Transcript, Nos. 218, 219, p. 77.)

10. Amendment to supplemental bill. Insert further prayer: That St. Paul Company has no right to operate Western Division except as part of a through route from Milwaukee to La Crosse over the Eastern and Western Divisions, as originally chartered; or, otherwise, that Eastern and Western Divisions shall remain an entire and through road, profits to be divided according to the miles run over on each division. (Transcript, p. 117.)

11. Second supplemental bill states:

That the bill of Bronson, Soutter, and Knapp, to which this is a second supplemental bill, was filed December 5, 1859, and prays that all the statements made in the first supplemental bill may be taken as part of this second supplemental bill.

That since the exhibiting of the first supplemental bill the following proceedings in said cause of Soutter, survivor, &c., *vs.* La Crosse and Milwaukee Company, this complainant, and others, have taken place.

That on the 28th of April, 1864, an order was made directing Hans Crocker, the receiver, to file a monthly account of his receipts and disbursements, and that any person inter-

ested therein might file exceptions thereto, and that H. L. Palmer was appointed auditor to report on such exceptions. That on the 28th of April, 1864, a further reference of the accounts of Crocker, as receiver, was made to the auditor, Palmer. That exceptions were taken to the report of said auditor by this complainant and the St. Paul Company, and the same were considered by the court and adjudicated. That the court did, by such adjudication upon said exceptions, determine that all the rolling stock, except forty box-cars, belongs to this complainant, and that of the rolling stock, purchased by the receiver, this complainant owned such proportion as $121,178 bears to $26,119, and that the court did in effect determine that complainant is entitled to recover against the St. Paul Company for the use of rolling stock owned by complainant and employed by St. Paul Company; that said adjudication is a complete and binding determination of the rights of the parties. That this complainant paid a large sum of money into court in December, 1865, under the decree of the court in the Eastern Division cause; that said sum of money was distributed among the bondholders, including the St. Paul Company, its officers and stockholders, and insists upon these proceedings as an estoppel to the claim now set up by the St. Paul Company to the rolling stock on the road when the receiver was appointed, as well as that purchased by the receiver.

That all the proceedings in said Eastern Division foreclosure cause, for more than two years prior to said decree last mentioned, were conducted by the solicitor of Bronson and the St. Paul Company, and that from May, 1863, the St. Paul Company was the owner of nearly all the bonds secured by the mortgage to Bronson, Soutter, and Knapp, and that said St. Paul Company, its officers, directors, and stockholders, were, during the two years next preceding said decree under which this complainant paid the said large sum of money, the owners of the majority of the bonds received by the mortgage to Bronson and Soutter of the Eastern Division.

That the St. Paul Company is operating the road from Milwaukee by Watertown to Portage; that in consequence of

this, complainant has been injured $1,000,000, and if the St. Paul Company is permitted thus to continue the use of the Watertown road, the annual loss to complainant will be $500,000.

That the La Crosse Company was incorporated under authority to run a continuous road from La Crosse to Milwaukee, and was not authorized to operate a line between other points. That under the statute law of the State of Wisconsin, at the time the mortgage to Bronson, Soutter, and Knapp was executed, it was provided that the successors of any company, who might become such by sale under foreclosure, should enjoy the same franchises, and no others, as the original company.

That the mortgage of the Western Division only conveyed such franchises as were appurtenant to the Western Division; that the mortgage to Barnes conveyed all the franchises of the La Crosse Company.

That on the petition of the St. Paul Company for possession of the Western Division, the district court directed that the Western Division could only be used as a part of one continuous line of railroad between Milwaukee and La Crosse on said Eastern and Western Divisions; that the two divisions were operated as one road, under order of the court, until September 1, 1864, when the St. Paul Company, intending to injure complainant, and without authority of law, and in violation of the said order of court, under which it had obtained possession of the entire road, did separate the use of said road at Portage, and has continued to divert all through business between La Crosse and Milwaukee from the Eastern Division, and has managed the Western Division only in connection with the road from Portage by way of Watertown to Milwaukee: in consequence of which complainant has lost over $1,000,000.

That while the Eastern and Western Divisions were operated as an entire road by the receiver, the profits arising from through business were divided as follows: 95-200ths to the Eastern Division and 105-200ths to the Western Division. That if the St. Paul Company fully performed the orders

under which it entered into possession of the entire road, complainant would have been entitled to the same rate of profits, which up to the time of filing this second supplemental bill would have amounted to over $1,000,000, for which the St. Paul Company ought to account to complainant: that complainant needs the aid of this court to take said account of profits.

Claims the right, as the successor of the La Crosse Company, to run trains the entire distance from Milwaukee to La Crosse, paying the St. Paul Company reasonable toll therefor.

That the Eastern and Western Division should be operated together, and if the companies cannot agree on the terms, a manager should be appointed to superintend the entire line. That the profits of all through business should be divided in the proportions heretofore stated as having been adopted, when the entire road was under the charge of a receiver.

Prays that it may be determined that the St. Paul Company has no authority to use the Western Division separate and apart from the Eastern Division, except as a part of a through line. That St. Paul Company may be enjoined from using Western Division, except as part of a through line in connection with the Eastern Division. That it may be determined that complainant has a right to run trains from Milwaukee to La Crosse, over Eastern and Western Division, paying a reasonable toll, or that the St. Paul Company and complainant are bound to operate their respective divisions as a through line, and that the profits be divided, and that each company be entitled to compensation for the use of its rolling stock in through transportation, or that such other basis of dividing the earnings be decreed by this court and shall deem equitable. That an account may be stated between complainant and the St. Paul Company concerning all profits arising from the through business since June 12, 1863, and that the St. Paul Company be decreed to pay to complainant as shall appear to be due to complainant; and that leave may be reserved in said decree for complainant to apply for a further order appointing a manager for the entire

road, in case of failure of the two companies to agree as to the management of the entire road, and for general relief.

12. Defendant demurs to so much of the bill as does not relate to the rolling stock, on the following grounds:

(*a*) Because the matters demurred to are not supplemental to the bill of Bronson, Soutter and Knapp.

(*b*) Because the matters demurred to relate to different subjects from the matters contained in the first supplemental bill.

(*c*) That the court has no jurisdiction of the new matters introduced.

(*d*) That the matters demurred to are such as do not entitle the complainant to discovery and relief.

Admits the proceedings, as stated in the suit of Soutter, survivor.

Denies that this defendant submitted itself to the jurisdiction of the circuit court, in the case of Soutter, survivor, &c., against the La Crosse Company and others, as stated in the bill, otherwise than by filing exceptions to the auditor's report.

Denies that the circuit court adjudicated on the question of the ownership of the rolling stock as claimed by defendant.

Denies that defendant's solicitor, John W. Cary, acted as counsel for Soutter in his suit to foreclose the mortgage on the Eastern Division.

States that defendant owned only sixty-six of the bonds, for security of which the mortgage on the Eastern Division was given.

Admits that defendant paid into court, under the decree in the Soutter case, the money stated in the bill, and that it was paid out to the bondholders, including officers, directors, and stockholders, of this defendant.

Admits that John W. Cary was solicitor for Bronson, Soutter, and Knapp, in their cause to foreclose the land-

grant mortgage, and was also solicitor of this defendant; and that defendant has been the owner of nearly all the land-grant bonds, and that officers, directors, and stockholders of this defendant were, at the time mentioned in the bill, owners of bonds secured by the mortgage to Bronson and Soutter on the Eastern Division. Denies that any of the proceedings in said last-mentioned cause were carried on with the aid of this defendant. Denies that defendant knew that Supreme Court of the United States had made the decision stated in the bill.

13. Decree, April 16, 1866.

The court being divided in opinion, it was ordered that the supplemental bills and the cross bill be dismissed.

III.—COMPARISON OF THE BILLS.

1. The first supplemental bill filed in this case by Minnesota Company set forth the different mortgages on the La Crosse Railroad, foreclosure of Barnes mortgage, and organization of present company, and its ownership of equity of redemption, and all theroad, &c., &c., of La Crosse Company. States, also, foreclosure of land-grant mortgage, the marshal's sale, and its confirmation. That land-grant mortgage did not include the rolling stock; that decree of sale, under Western Division foreclosure, only ordered sale of forty box cars; that court only placed the rolling stock in possession of St. Paul Company, and did Eastern Division, &c., public convenience. Bill charges that no proceedings were had in land-grant cause to determine net earnings of Eastern and Western Divisions, so as to fix the portions of rolling stock purchased by receiver, belonging respectively to Eastern and Western Divisions; that St. Paul Company claimed nearly all the rolling stock.

Bill was filed as supplemental to land-grant foreclosure cause, and claims benefit of proceeding in that cause.

Bill prays that the Minnesota Company might be decreed to be the owner of all the rolling stock on road when receiver appointed, except forty box-cars; for an account of relative earnings of the two divisions; that upon the basis

of the decree in the land-grant cause, it might be determined what proportion of the rolling stock purchased by receiver belonged to the Minnesota Company and St. Paul Company, and for division of such stock purchased by receiver; also for allowance of rent for use of their rolling stock on Western Division, and that the avails be applied to interest on mortgage, and for general relief.

On appeal, the Supreme Court of the United States held that the title of the Minnesota Company is clear to the rolling stock, unless divested by proceedings in foreclosure suits. But court think these proceedings only divested Minnesota Company of the forty box cars, and only confer title on St. Paul Company to said forty box cars, and the proportion of stock purchased by receiver which the net earnings of Western Division have to the net earnings of the Eastern Division, and "also that the mortgage under which they (the St. Paul Company) claim did not include any more." (See 2 Wallace, 641.)

Since this decision, Minnesota Company amended their bill, charging insolvency of St. Paul Company.

St. Paul Company answer first bill.

Cross bill by Soutter and Knapp.

2. The second supplemental bill states proceedings in Soutter, survivor, &c., *vs.* La Crosse Company *et al.*, since filing first supplemental bill; that in such proceedings, on exceptions, court determined that all rolling stock except forty box cars belonged to complainant, the Minnesota Company, and fixed proportion of each company to rolling stock purchased by receiver as $121,178 is to $426,119; that court in effect determined the Minnesota Company entitled to recover against the St. Paul Company for use of rolling stock; that Minnesota Company paid large sums of money into court, in Eastern Division cause, and this money went in part to St. Paul Company, which is thereby estopped to claim the rolling stock; that proceedings in Eastern Division cause were carried on by solicitor of Bronson and St. Paul Company; that St. Paul Company owned nearly all the bonds for which complainant paid said large sum of money.

That St. Paul Company operates Watertown Division, by reason of which complainant injured $1,000,000: if St. Paul Company permitted to do this, annual loss will be $500,000; that successor of La Crosse Company only authorized to run old line from Milwaukee to La Crosse; that foreclosure of Western Division only conveyed franchise of Western Division; that mortgage to Barnes conveyed all the franchises of La Crosse Company; that district court, in giving possession of Eastern Division to Western Division, decided that the Western Division could only be used in connection with Eastern Division; that two divisions operated as one road, until September 1, 1864, when St. Paul Company ran continuous line by Watertown, disconnecting the through connection with Eastern Division to its loss $1,000,000; that while the two divisions jointly operated by St. Paul Company, the Eastern Division entitled to a determined rate of profits, at ninety-five two hundredths to one hundred and five two hundredths; that on that basis the St. Paul Company, if they had executed order of court, would, on filing of this bill, owe complainant $1,000,000; that St. Paul Company should account for this.

Claims right, as successor of the La Crosse Company, to run through trains to La Crosse, paying fair toll therefor. That the two companies should be operated together, as a continuous line. That common manager should be appointed, and profits divided in proportion hereinbefore stated. Prayer corresponding to these statements.

3. Demurrer and answer of St. Paul Company, as to so much of said bill as does not relate to the rolling stock.

(*a*) Because matters are not supplemental to bill of Bronson, Soutter, and Knapp.

(*b*) Because these matters relate to different subjects from those in the first supplemental bill.

(*c*) That court has no jurisdiction, new matters introduced.

(*d*) Matters demurred to are such as do not entitle complainant to discovery and relief.

4. The circuit court having dismissed the supplemental bills in this case, the question arises whether that was a proper order. It is proper to add, this order of dismissal was the result of the two presiding judges not being able to agree in opinion.

This question may properly be considered in two aspects.

IV.—CONSIDERATIONS OF LAW.

i.—*Pleadings.*

1. As respects the dismissal of the first supplemental bill, the Supreme Court having overruled the demurrer originally filed to this bill, and sent the case back for hearing on its merits, it became the duty of the circuit court to hear the case on its merits, and if the allegations of the bill were sustained by proof, to decree accordingly.

It is submitted that the evidence produced in the case did sustain the allegations of the bill, and the court should have made a decree sustaining the complainant's right. If the matters of account, in the opinion of the court, required further examination, they might have been referred to the master. In this way the circuit court would have executed the mandate of the Supreme Court.

And there is no ground for insisting that the second supplemental bill vitiated the first supplemental bill, if it be admitted that there was any error in the second supplemental bill; because the first supplemental bill could be considered as a separate bill from the second supplemental bill.

2. But it is not admitted that the second supplemental bill contains matters improper to be introduced.

The principle upon which the first supplemental bill is sustained by the Supreme Court is, that "an unjust advantage has been obtained by one party over another by the perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court; and that while the property, which is the sub-

ject of contest, is still within the control of the court and subject to its order."

The second supplemental bill proceeds on the doctrine of law thus laid down in this case by the Supreme Court.

After stating certain proceedings in the original cause, in regard to the rolling stock, which had taken place subsequent to the filing of the first supplemental bill, to which, of course, no exception can be taken, the second supplemental bill goes on to complain that the St. Paul Company is running its through trains in connection with the Watertown Division, to the great damage of the Minnesota Company. This complaint is founded upon the idea, that the St. Paul Company, as purchaser under the decree of the court of the Western Division, was bound to operate such division in connection with the Eastern Division. If this idea be correct, then the second supplemental bill is in entire accordance with the law as laid down by the Supreme Court. Whether this idea is erroneous or not, is a matter for judicial examination.

It is submitted that the new matter introduced in the second supplemental bill is fully authorized by the doctrines of law laid down by Supreme Court, in regard to the first supplemental bill.

The circuit court ought, therefore, to have proceeded to hear and determine both the supplemental bills, and to have given complainants such relief as they were entitled to receive.

3. The demurrer of the St. Paul Company states the following grounds:

(*a*) Because the matters demurred to are not supplemental to the bill of Bronson, Soutter and Knapp.

The defendant seems to misapprehend the principle of equity under which the bill in this case is sustained. It is not a supplemental bill in the ordinary meaning of the term.

It is a bill which grows out of the proceeding and decrees in Bronson, Soutter and Knapp. The court, in that case, acted upon two subjects; among others, the rolling stock and the Western Division of the old La Crosse road. By reason of such action, the Minnesota Company complain that great

loss has accrued to them by the acts of the St. Paul Company, which they have been put in position to perform by the orders and decrees of the district and circuit court. It is to afford a remedy for these acts of the St. Paul Company that the so-called supplemental bill has been filed. If the Minnesota Company has suffered the loss it alleges by the action of the St. Paul Company, it was entitled to legal redress in some court. To go into a State court was, in a greater or less degree, to hazard the antagonism of two different jurisdictions. The Federal court being in possession of the subject-matter, the Western Division and the St. Paul Company being a party litigant before it, it was peculiarly proper to seek redress in the Federal court. What is called the second supplemental bill is, therefore, but a continuance of the original case of Bronson, Soutter and Knapp.

This second supplemental bill may be rested upon the principle, which authorizes a bill for injunction against a judgment of the United States court to be filed in the United States court, though defendant is not generally amenable to the process of the court.

The same general subject-matter, and the same parties having been before the court in Bronson, Soutter, and Knapp, the further litigation now sought in this case goes, as a proper and natural consequence, into the United States court. It is a matter of serious difficulty to determine the vexed questions which have arisen in this controversy, when they have been confined to a single jurisdiction; but if they are to be submitted to a further litigation in the State courts, no reasonable end can be forseen to the litigation.

The principle of law on which the first supplemental bill was sustained by the Supreme Court of the United States necessarily justifies the second supplemental bill.

The first supplemental bill complains of wrongful action of the St. Paul Company in regard to the rolling stock. The second supplemental bill makes a like complaint as to the action of the St. Paul Company in regard to operating its section of the road. The bill was sustained as to the rolling stock, because the St. Paul Company had derived the possession of

the rolling stock from the decree of the United States court, and had, in violation of the decree of the court, injuriously effected the rights of the Minnesota Company. The second supplemental bill charges the same conduct of the St. Paul Company in regard to the operating of the Western Division. By virtue of the same principles on which the court acted in sustaining the first supplemental bill, the second supplemental bill must be sustained.

It must be kept in mind that all that part of the second supplemental bill which relates to matters other than the rolling stock is admitted to be true by the demurrer. The facts thus admitted show, it is submitted, the strongest possible ground for the interposition of the court.

(*b*) The second ground of demurrer raises the question of multifariousness. Upon this point it is deemed sufficient to the annexed authorities.

It was well observed by Lord Cottenham in Campbell *vs.* Mackay, 1 Mylne and Craig, 603, and the same doctrine was affirmed in this court, in Gaines and Wife *vs.* Relf and Chew, 2 Howard, 619. 642, that "it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances." If entire justice cannot so conveniently be done against the same defendants, without uniting different subjects, they may be united in a bill.

Oliver *vs.* Piatt, 3 How., 479.

See also Story's Equity Pleadings, secs. 530–540.

Attorney General *vs.* Cradock, 3 Mylne and Craig, 85.

"Where there is a joinder of distinct claims against the same parties, it has never been held, as a general proposition, that they cannot be united." (Story, Equity Pleading, sec. 531.)

"No such rule, (that distinct claims cannot be joined,) however, has been established. On the contrary, a different doctrine has been maintained, and it seems now supported by the most satisfactory authority." (Story, Equity Pleading, sec. 532.)

The result of the principle to be extracted from the cases

on this subject seems to be, that where there is a common liability and a common interest, a common liability in the defendant and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit. Thus a bill is not necessarily multifarious by reason of its seeking to redeem two distinct mortgages of different parcels of real estate, or by reason of its seeking specific performance of different contracts relating to different parcels of real estate. (Story's Pleading, Equity, sec. 533.)

Indeed, where the interests of the plaintiff are the same, although the defendants may not have a co-extensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them. (Story's Equity Pleadings, sec. 534.)

One of the specific objects of equity jurisdiction is "to prevent multiplicity of suits." (Mitford's Eq. Pl., by Jeremy, 111, 112.)

A demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant and are well pleaded. (Story's Equity Pleadings, sec. 452.)

(*c*) The third and fourth grounds of demurrer are so general that no particular notice of them is deemed necessary.

The anxiety of the St. Paul Company, by its demurrers, to escape from the jurisdiction of this court, is an acknowledgment of the weakness of its cause.

ii.—*Summary of Argument on Rolling Stock.*

The subject, it seems to me, is much better presented in favor of the Minnesota Company in the opinion of the Supreme Court, in Milwaukee County *vs.* Soutter, survivor, than anywhere else.

1. The mortgage of Western Division embraced entirely

different part of the railroad from mortgage of Eastern Division. The mortgages were of separate and distinct things. This is perfectly clear, so far as the sections of the road were concerned. It is a fair inference, that this same character of separation was intended in regard to the rolling stock; and, therefore, that each mortgage was only intended to embrace the particular rolling stock attached to it, or considered as specially belonging to it. This principle of interpretation gives unity and consistency to the purposes of the company in making mortgages of different parts of the road. We are to presume, therefore, that a different set of rolling stock was intended to be embraced in the Western Division mortgage from the Eastern.

The Western Division of the road was not finished when the land-grant mortgage was given. It might have been expected that when it became completed a special assignment of stock might be made to it.

2. But the important question as between the two rival companies is—how did the district court decide this matter?

This decision is conclusive in two points of view:

(*a*) Because the St. Paul Company could not buy more than the court ordered to be sold.

(*b*) Because the decision of the district court is *res judicata* between the parties, until such decision is reversed on appeal in the land-grant cause.

It is submitted, the district court decided that only forty box-cars and the proportionate part of the rolling stock should be sold.

3. The district court, before decree of sale, made reference to masters to ascertain the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by this mortgage, also in the first and second mortgages respectively.

The object of this reference was evidently to ascertain what rolling stock was embraced in each mortgage.

(*a*) The master's report fixes the total value of the rolling stock at $623,235 78, and they add: "We have ascertained and report that, of the said rolling stock, forty box-cars,

numbered, &c., are included in said mortgage;" and all the remainder of the rolling stock is included in the first mortgage to Bronson and Soutter.

The complainant excepted to this report, on the ground "that all the rolling stock on said road was covered by and included in the mortgage given to complainants, and that said mortgage was a prior lien on said rolling stock."

This exception was overruled by the court.

This was evidently a judicial determination of the question, and settled that the land grant mortgage did not include anything but the forty box-cars and the proportionate part of the rolling stock purchased by the receiver.

(*b*) The decree of sale provides for sale of forty box-cars, and a proportionate part of the rolling stock purchased by the receiver. The decree then expressly adds: "The remaining rolling stock is subject to a prior mortgage."

The order specifying the forty box-cars and proportionate part of the rolling stock precludes the idea that more of the rolling stock was to be sold.

The court, in stating that the remaining rolling stock is subject to "prior mortgage," meant something. They must have made this remark as a reason for not ordering the sale of "the remaining rolling stock."

It is true the marshal sold all the rolling stock, but it is clear that he could not lawfully sell more than he was authorized to sell.

(*c*) Nor does the order of the court confirming the sale make it valid to this excess.

This order of confirmation must have been made in inadvertence by the court; because, immediately after, the court made an order to deliver the rolling stock to St. Paul Company, as "specially described in the decree."

The only rolling stock specially described in the decree was the forty box-cars, and the proportionate part of the rolling stock purchased by the receiver.

This order shows the court's intention as to what rolling stock should be sold, and what was intended by the order of confirmation of marshal's sale.

(*d*) From this review of the orders of the court, in reference to the sale of the rolling stock, it is clear the St. Paul Company cannot claim title to all the rolling stock. If they were misled in their purchase by the action of the marshal in selling all the rolling stock, and failed to obtain a satisfactory adjudication of the question in their favor, their remedy was to have sought a rescession of the contract.

The decree of sale in Eastern Division cause orders all the rolling stock to be sold except forty box-cars. This shows that the judge intended to make an order as to the sale of distinct property in each case.

(*e*) The St. Paul Company insist that they were not parties to the land grant suit.

It is submitted that they were such party.

§. As purchasers at sale.

Blossom *vs.* Railroad, 1 Wallace, 655.

§. By filing their petition and asking for the delivery of the road, &c.

§. By filing exceptions to auditor's report, and appearing before auditor.

§. By taking an appeal.

§. As *quasi* receiver.

4. The question of rolling stock was before the Supreme Court twice at least.

(*a*) The Minnesota Company *vs.* St. Paul Company, 2 Wallace, p. 609: where the court say: "The title of appellant (the Minnesota Company) is clear on the record, unless it has been divested by these proceedings. We think that they do not confer title to the rolling stock on the Milwaukee and St. Paul Company, nor divest the appellant, except as to the forty box-cars and the proportion of the stock purchased by the receiver; * * and that they also decide that the mortgage under which they claim did not include any more."

(*b*) In Soutter and Knapp *vs.* Minnesota Company and others, referred to in note 5 Wallace, 662, where it is stated "they (Soutter and Knapp) had appealed from original decree of foreclosure, on the ground that it did not include

certain property which they were entitled to have sold under the mortgage."

The court being equally divided, the decree and orders complained of were therefore affirmed.

5. The dissenting judges in Minnesota Company *vs.* St. Paul Company say. "The St. Paul Company, by reason of their title under the mortgage, foreclosed on the Western Division, acquired the same right" (to use the rolling stock in running their road.)

This proposition is inaccurate. It confounds the right of the St. Paul Company with the right of the mortgagees in the land grant mortgage, which is a mistake. The question as to the St. Paul Company is, how much rolling stock they acquired by their purchase. To determine this, exclusive reference must be had to the decree of sale in foreclosure suit of Western Division. The dissenting judges in effect concede that all the rolling stock was not ordered to be sold by the district judge, because they say, "The district court, however, seems to have entertained the idea that any of the rolling stock purchased by the proceeds of the bonds of a particular mortgage should be exclusively subject to the lien of that mortgage, and made a reference for that purpose, and on the coming in of the report, acting upon this idea, decided that some forty box-cars purchased by the proceeds of the bonds of the first mortgage on the Western Division should be sold, and the proceeds applied exclusively to this mortgage, and that all the rest of the rolling stock on the road (meaning the whole road) when the receiver was appointed was covered by the first mortgage," &c.

6. The district judge may have erred in determining what rolling stock should be sold under the land-grant foreclosure mortgage, but whatever his decision was, it fixes the amount of stock bought by the St. Paul Company. They could not possibly buy any more rolling stock than the district court ordered to be sold.

Their claim to hold the rolling stock has been based false premises from the outset.

Not having been put up for sale, it could not have been

bought by them. They never did buy it. Of course they never paid for it. In no possible sense does it belong to them.

By contrivances of deceit, and continuous defiance of the courts, the St. Paul Company held this rolling stock for years, without the shadow of a lawful claim, to the injury of its lawful proprietor, the Minnesota Company, subject, of course, to the ultimate rights of the mortgagees of the La Crosse Road, but discharged from the rapacious usurpation of the St. Paul Company.

ii.—*Supplemental Mortgage.*

The St. Paul Company also pretends that since the adjudication of this court against its pretensions of ownership to this rolling stock, a new mortgage has been discovered, which has never yet been foreclosed, and which it claims mortgaged all the rolling stock to Bronson, Soutter, and Knapp.

The answers to this are:

1. The mortgage is a mere chattel mortgage, and never was filed according to the statute; and for that reason is, by the statute, declared void as against creditors and *purchasers.* The Minnesota Company is a purchaser at the foreclosure sale, under a subsequent mortgage. This chattel mortgage is therefore wholly void as to said company.

R. S. Wis. 1858, (re-enactment,) ch. 45, sec. 3.

Cotton *vs.* Marsh, 3 Wis., 221.

2. The mortgage was never renewed by affidavit, as required by statute, and expired one year from its date.

R. S. chap. 45, sec. 5.

3. The mortgage itself provides that the property therein conveyed should be held by Bronson, Soutter, and Knapp, under their principal mortgage, and that they should sell and dispose of "the same in the same manner, at the same time, and upon the same conditions," as the other property mortgaged, *and not* otherwise.

The trustees sold the other property under the decree obtained upon that mortgage in 1863; and now, to authorize

them to foreclose this mortgage by subsequent and independent proceedings, *would be to override the express provisions of the mortgage itself*, and give the trustees a power under the mortgage that the mortgage *expressly* denies.

But, waiving all these objections, conceding the validity of the mortgage, and the right of the trustees to foreclose it, how can the St. Paul Company claim any benefit from it? That company is not the mortgagee, is not an assignee of the mortgage, has no rights and pretends none, except as holder of bonds secured by the mortgage. The Minnesota Company—the owner of the equity of redemption—cannot be deprived of its rights until that is foreclosed; and on the foreclosure of the mortgage, if it shall ever be foreclosed, the property must be sold at public auction, and we are as likely to become the purchaser as they are. One of two things is certain, this mortgage either has or has not been foreclosed.

(*a*) If it has been, then it is merged in the Western Division foreclosure decree; and this court has already decided that the St. Paul Company acquired no title to this property by virtue of their purchase under that decree.

(*b*) If it has not been foreclosed, then the St. Paul Company, which is a purchaser of only what that decree ordered to be sold, can claim no benefit under this mortgage, which was not foreclosed by that decree.

iii.—*Question of Through Line.*

1. The Milwaukee and St. Paul Railway Company exists only in virtue of a fractional mortgage of a part of the La Crosse and Milwaukee Railroad Company, *by metes and bounds*. Concede, for the argument's sake, that the St. Paul Company owns the Western Division of the road of the La Crosse Company by metes and bounds; does it own the franchise of the La Crosse Company by metes and bounds?

No, that is impossible; that is not in the statute of Wisconsin, nor is it in the nature of things. You might as well undertake to mortgage a part of a ship, or of a horse, or of a steam engine, or of a man, by metes and bounds.

East Boston Freight R. Co. *vs.* Hubbard, 9 Allen.

The statutes sanction a mortgage of part of a chartered railroad by subdivision, if you please, and the constitution of a new company on that subdivision; and in legislating as to the franchise, the statute, as it seems to me, contemplates the subsistence of the original franchise, and the formation and working of the new company or companies in subordination to the original charter.

On that hypothesis, each of the fractional companies is confined to the original road, and cannot diverge from it beyond the limits to which the original company might go. One of the fractions cannot make its property the means of breaking up the original road, or of diverting its travel and business to a competing road.

Thus, here, the St. Paul Company took a division of the road of the La Crosse, and with a franchise of that division; but its franchise must be deemed a servitude only in the franchise of the La Cross Company.

In the same way, if the mortgage on the Second Division had gone to sale, and a new company, which, for supposition, we will name the Milwaukee and Portage Company, had been formed, this company would also have held a franchise in subordination to the La Crosse Company.

These companies would then be bound to maintain the life of the line of road of the La Crosse Company as the essence of their own life, and to co-operate to operate the La Crosse Company.

If they would not do this voluntarily, if they should engage in internecine war to the destruction of one another, they would have to be disciplined by the courts, or, in default of power there, then by the Legislature of the State.

The several fractional mortgages of the La Crosse and Milwaukee Railroad, supposing them to have had any effect on the franchise of the railroad, did not extinguish or annul that franchise; but, on the contrary, left it, in full life and force, to pass into the hands of the Milwaukee and Minnesota Railroad Company.

All which the Milwaukee and St. Paul Company took, or could take, under the mortgage of the Western Division,

from Portage to Lake Crosse, was a privilege, an easement, a servitude, in so much of the franchise as comprehended that Western Division.

A corporate franchise is no more capable of sub-division by metes and bounds than the life of a man, howsoever limbs may be taken from his body, or fractional rights acquired in respect to himself, his mind, or his person.

The rights and privileges, if any, acquired by the fractional mortgages of the La Crosse and Milwaukee Railroad, in this case, are anomalous and *sui generis;* but analogies may be found in the law of servitude, personal and real; in that of water power and privileges, and in that of patents for inventions and copyrights.

But the rights of the Milwaukee and Minnesota Railroad Company, in this behalf, stand on the firm foundation of the reason of things; the interest of the public in the line of road prescribed by the charter of the La Crosse and Milwaukee railroad; the legislative contract of the State in that respect; and the legal claim of the inhabitants of the State, whose lands were taken, and local investments and improvements made, on the faith and legislative assurance of a continuous railway from Milwaukee, by Horicon and Portage, to La Crosse.

As we understand the opinions of the district judge, such has been his theory on the subject of the subdivision of the La Crosse Company, and we think it is the correct theory. If the St. Paul Company had observed and obeyed his order, based on this theory, it would have been better for them, as well as the community; but their misjudgment of their own interests led them into another direction, at every step of which they have plunged deeper into violations of law, until they now stand here convicted of criminal contempt, and subject to heavy damage for the indemnification of the Minnesota Company.

C. CUSHING,

Counsel for the Minnesota and Milwaukee Co.

APPENDIX.

A.

EXTRACTS FROM OPINIONS OF DISTRICT JUDGE A. G. MILLER.

1. *On the Eastern Division bill.*

From the best consideration I can give the subject, I think the rolling stock on the whole road is to be considered a fixture, and is pledged to the first mortgage of nine hundred and fifty thousand dollars, unless it can be shown affirmatively how much or what portion was procured by funds received out of the issue of land-grant bonds and the second mortgage bonds, or either of them. So much of the stock as can be shown to have been procured out of either of those issues, or out of the revenues of so much of the road as was built with funds arising out of those issues of bonds, respectively, will pass with the sales on said mortgages. The first mortgage is a lien on the road and fixtures from Milwaukee to Portage City. It was the first pledge of the road and fixtures to creditors. And I apprehend it is the conveyance of the franchise of the corporation granted by this charter, as it is not probable that the corporation could divide its franchises by making mortgages of several parcels of the road and property. That would be creating several corporations by deed of a company to which the Legislature granted but one.

2. *On the Western Division bill.*

The legislation of this State was evidently with the view of enabling railroad companies, and especially the La Crosse and Milwaukee Railroad Company, to raise money in advance, by bonds and mortgage, for the purpose of building their roads and procuring rolling stock. The directors of this company were given almost unlimited license to make bonds and mortgages, payable in any manner they might deem proper, and to pledge or mortgage their property as security. By the terms of the mortgages, the rolling stock to be procured or pledged to secure the debt contracted for raising the means of its procurement. In equity, those pledges should be sustained, and the persons who purchased the company's bonds and furnished the means for the procurement of the stock should be protected. And they also furnished the means for building the road, from which revenues they have been derived, to enable the company to procure rolling stock. This matter is fully settled, as authority to this court, in the case of Pennock *vs.* Coe, 23 Howard, 117. The rolling stock was procured by the company as owners, and was fitted and adapted to the road as the means of operating it; and so long as it is thus used, it should be considered as fixtures, even without statute of law. The first mortgage covered all the after-acquired rolling stock, except such as should be proven to have been purchased with funds raised upon subsequent mortgages. To that extent those mortgages should have a superior equity. For these reasons the exceptions will be overruled. But the decree will, in addition to the forty cars reported by the masters, allow to this mortgage its share of all the rolling stock purchased and procured by the receiver, costing $147,942, in proportion to the net revenues.

Complainants (Soutter and Knapp) have urged the court to include in the decree an order to place purchasers in possession, and to authorize them to recog-

nize under the act concerning railroads, approved October 10, 1856. They contend that this deed is the first deed of trust or mortgage under that act, which authorized a mortgage of the franchise, and also empowered purchasers under it to reorganize. Section 4 of that act allows deeds of trust or mortgages theretofore executed to be included in the several provisions of the act, provided the railroad company shall first accept the provision of the act by a resolution of its board of directors, and shall cause a copy thereof, under a certificate of its secretary, with the corporate seal attached thereto, to be filed in the office of the Secretary of State.

It is understood that a corporation cannot absolve itself from the performance of its obligations to the public without legislative authority. Nor can it, without the consent of the Legislature or the stockholders, dispose of its franchise. (Railroad Co. *vs.* Winans, 17 Howard, 20-39.) Nor can a creditor, without such authority, attach and sell any portion of the property of an incorporated company that is essential to the enjoyment of the franchise. (Gue *vs.* Tide-Water Canal Co., 24 Howard, 257.) The first mortgage in terms includes the franchise, and covers the road from Milwaukee to Portage City; but whether the company at the date of that mortgage, by a legal construction of its charter and other acts, had authority to mortgage the franchise, or whether the act of the 10th of October, 1856, has been accepted by the company, have not become legitimate subjects of inquiry in this case. Upon this subject the holders of the bonds secured by the first and the other mortgages have not had their day in court, and they are entitled to be heard.

The first section of the act of October, 1856, provides that any railroad company may borrow money, and may execute one or more trust deeds, or mortgages, or both, as occasion may require, and any railroad or railroads constructed or in process of construction, and may make such provisions in such deed or mortgage for pledging or transfering their railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, &c., in any manner whatever, as security, as they shall think proper. And in case of any sale of any railroad, or any part thereof, the parties acquiring title under such sale, and their associates, shall exercise and enjoy thereafter all the same rights, privileges, grants, franchises, immunities and advantages, in and by such deed enumerated and conveyed, which belonged to the company, so far as the same relate and appertain to that portion of said road described in the deed, and no further. And the purchasers are authorized to reorganize the company. This act vests the franchise in the purchasers, and authorizes them to enjoy the same rights and immunities as were enjoyed by the company, or the creation of a new corporation without the aid or consent of the stockholders, but only to the extent of the deed. This act, I apprehend, does neither contemplate a second deed of trust of a road and franchises, or of a portion of them, nor a mortgage of the equity of redemption of a road and franchise, or of a portion of them, as a basis of reorganization; and I presume an organization on such basis would be subordinate and subject to the consent and control of stockholders and prior creditors. Nor do I apprehend that the Legislature, either in word or intention, authorized the formation or continuance of more than one corporation. If this view of the matter is correct, it will follow that the first lawful mortgage or deed of trust of the franchise will draw to it, necessarily, the whole franchise and power of the corporation, and that purchasers under other deeds or mortgages will be entitled to their share of the revenues, either as purchasers individually, or in the character of a nominal corporation, in proportion to the actual amount of their purchase. But, however this may be, a decree will be made in both cases for the sale of the premises, as described in the deeds; and this subject can be more maturely considered when purchasers apply for possession.

B.

EXTRACTS FROM ARGUMENTS AND BRIEFS OF MR. M. H. CARPENTER.

I. *Competency of Supplemental Bill.*

(*d*) This is a bill in the nature of a supplemental bill, and the circuit court of the United States had jurisdiction of it, although the complainant and the Milwaukee and St. Paul Railway Company, one of the defendants, are both corporations created by the laws of the same State.

"The most general division of bills is into those which are original and those which are not original. Original bills are those which relate to some matter not before litigated in the court by the same persons, standing in the same interests. Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are either in addition to or a continuance of an original bill, or both." (Story Eq. Pl., sec. 16.)

"Bills not original are either (1) an addition to or a continuance of an original bill, or (2) they are for the purpose of cross litigation, or of controverting or suspending or reversing some decree or order of the court or carrying it into execution." (Story Eq. Pl., sec. 20.)

"An imperfection in the frame of a bill may generally be remedied by an amendment; but the imperfection may remain undiscovered whilst the proceedings are in a state that an amendment can be permitted according to the practice of the court. *This is particularly the case where, after the court has decided upon the suit as framed, it appears necessary to bring some other matter before the court to obtain the full effect of the decision.*" (Hughes Eq. Draftsman, 400.)

(*g*) In this cause, as to the rolling stock purchased by the receiver, and which is disposed of by the decree—or, rather, as to which the decree merely declares the principle which shall govern its division between the two portions of the road—nothing was put in issue by the original frame of the bill upon which it could be determined how much belonged to the Eastern and how much to the Western Divisions, respectively; and, after publication, this matter could only be determined by supplemental bill.

Goodwin *vs.* Goodwin, 3 Atk., 370.
Dormer *vs.* Fortesque, 3 Atk., 132, 133.
Jones *vs* Jones, 3 Atk., 109.
Edgar *vs.* Clevenger, 2 Green's Ch., 258.
Allen *vs.* Taylor, 2 Green's Ch., 435.
Whitbeck *vs.* Edgar, 4 Sandf. Ch., 427-433.
Foster *vs.* Deacon, 6 Madd., 59.

It is settled by the decree that the purchaser shall acquire such a proportion of the rolling stock as the net earnings of the mortgaged premises—the Western Division—bear to those of the Eastern Division; but what that proportion is—whether one-third, one-half, or two-thirds—the decree does not profess to determine; nor did the record disclose the facts upon which the court could determine it, at the date of the decree. This can only be done by a bill like the present, in the nature of a supplemental bill, between the owner of the equity of redemption and the purchaser.

Story Eq. Pl., sec. 345.
Whitbeck *vs.* Edgar, 4 Sandf. Ch., 427.

The decree settled the rights of the purchaser and of the owner of the equity of redemption, in one sense, by settling the principle upon which the rolling stock was to be divided.

It is true that the other mortgagees of the debtor company are not bound by this decree, not being parties to the record.

But the Milwaukee and Minnesota Railroad Company was the owner of the equity of redemption of the whole road, and, as against the purchaser under the land grant decree, of course remains, since the sale, the owner of all the rolling stock, except that which the purchaser acquired under the decree. The purchaser of the premises, the Milwaukee and St. Paul Railroad Company, by its bid, became a *quasi* party to the suit, (Blossom *vs.* Railroad Company, 1 Wall, 556,) and the Milwaukee and Minnesota Railroad Company was a party; and the decree is binding and conclusive between these parties, and settles the principle upon which the rolling stock must be divided between them; and each of these parties, as against the other, has an interest in the decree, and a right under it, to secure the benefit of which either of them may invoke the aid of the court. The purchaser (the Milwaukee and St. Paul Railway Company) may claim under this decree forty box cars and a proportion of the rolling stock purchased by the receiver, and the Milwaukee and Minnesota Railway Company may claim under this decree, and as against the purchaser, all the other rolling stock. And the decree just as effectually settles this right of the latter company as it does the right of the purchaser.

But they must determine, by arrangement between themselves, or by subsequent litigation, the matter of fact—that is, what ratio the net earnings of the Western Division bear to those of the Eastern Division; and to this fact, when ascertained, the court will apply the principle of the decree, and thus determine the respective rights of these parties to the rolling stock purchased by the receiver.

See Story Eq. Pl., secs. 335, 338, 345.
Dormer *vs.* Fortesque, 3 Atk., 132, 133.

This is one of the objects sought, by the Milwaukee and Minnesota Railroad Company, to be accomplished by their bill; and clearly, as to this matter, this bill *relates to the original suit, and merely supplies a defect which existed in it by necessity*, and therefore comes precisely within the definition given by Story, Milford, and all other writers, of a blil in the nature of a supplemental bill, *which all define as a bill not original*

The cases clearly establish the right to maintain a supplemental bill to have the original decree carried out and applied to its subject-matter.

Binks *vs.* Binks, 2 Bligh, 593.
Woodward *vs.* Woodward, 1 Dickens, 33.
Story Eq. Pl., sec. 429.
Lord Cartevelt *vs.* Paschal, 3 Pierre Williams, 197.
Linton *vs.* Petits, 4 Bl'kf'd, 396.
Lawrence *vs.* Berney, 2 Rep. in Ch., 128.
Hodson *vs.* Ball, 1 Philips, 179.

The cases as clearly establish the right of a defendant, as well as a complainant, to maintain such bill to secure a right secured by a former decree.

Story Eq. Pl., 337, *a*.
Standish *vs.* Radley, 2 Atk., 177.
Baker *vs.* Whiting, 1 Story's Rep., 218.
Barrington *vs.* O'Brien, 2 Ball & Beatty, 140.
Gifford *vs.* Hort, 1 Sch. and Lef., 386, 394, 410.
Foster *vs* Deacon, 6 Madd., 44, 59.
Whitbock *vs.* Edgar, 4 Sandf. Ch., 432.
Heathcote *vs.* Heathcote, 4 Hare, 161; 30 Eng. Ch. R.
Whitbeck *vs.* Hughes, 1 Dickens, 283.
Barrington *vs.* O'Brien, 1 Ball & Beatty, 173.
Williams *vs.* Cook, 10 Ves., 406.
Welford Eq. Pl., 113.
Oldham *vs.* Oldham, Cooper, Temp. Brougham, 27.

The principle of the former decree must be applied in the suit by supplemental bill, whether right or wrong.

Jenkins *vs.* Cross, 38 Eng. Ch., 75.

These cases leave no doubt of the right of the complainant to maintain this bill, as to the rolling stock purchased by the receiver, as a bill in the nature of a supplemental bill. If the bill can be maintained for any purpose, the demurrer, which is general, must be overruled.

Story Eq. Pl., 443 and notes.

Being a supplemental bill, it is no objection to the jurisdiction that the parties to it are citizens of the same State.

Hatch *vs.* Dorr, 4 McLean, 112.
Morgan *vs.* Morgan, 2 Wheat., 290.
Logan *vs.* Patrick, 5 Cranch, 288.
Dunlap *vs.* Stetson, 4 Mason, 360.
Molan *vs.* Terrence, 9 Wheat., 537.
Clark *vs.* Matthewson, 12 Pet., 164.

(*c*) But there is still a broader ground upon which this bill must be sustained, not only as to the rolling stock purchased by the receiver, *but as to all the rolling stock.*

In our complex system of Federal and State jurisdictions, that court, whether State or Federal, which first acquires jurisdiction of any subject of litigation, must retain it to do full and complete justice between the parties; and not only between the parties, but between them and any third person not a party to the record, as to the subject-matter of litigation of which it has acquired jurisdiction.

If, in the exercise of its jurisdiction, a Federal court, by its receiver or marshal, comes to have custody of any property, real or personal, a third person, not a party to the proceedings, but claiming any right to or interest in such property, must come into such court and there litigate his right. No State court can entertain any suit with regard to property so held; and for that reason the Federal court will sustain a suit in equity to protect the rights of such third person, without regard to citizenship of parties, because such suit is not original but ancillary and supplementary merely to the original suit out of which the question arises.

Freeman *vs.* How, 24 How., 460.

This rolling stock, belonging to the complainant in this bill, is in the custody of a receiver of the Federal court, or should be. A State court cannot entertain any suit in regard to it without coming in direct conflict with the jurisdiction of the Federal court. There is no such thing as a partial jurisdiction over the subject-matter of a litigation. It is full and complete, or does not exist at all. If a State court could entertain this bill then it could appoint a receiver to take possession of the property pending the litigation; yet the property is already held by a receiver of the Federal court. The complainant is, therefore, without any remedy except in this court.

Again, this bill states, and the demurrer admits, that this property was taken into the custody of the Federal court by its receiver; that the receiver and the defendant are in corrupt collusion to injure and defraud the complainant; and that the decree of the Federal court and its possession by receiver are being abused and perverted to the complainant's injury. Upon this ground alone this bill is properly brought in the Federal court.

Freeman *vs* How, 24 How., 460.

II. *Rolling Stock Question.*

The Milwaukee & St. Paul Company claim, as purchasers at the sale under the land grant decree; and their rights are only to be determined by that decree

and the previous proceedings in that cause. No adjudications in the other cause could affect the rights of the parties to the land grant foreclosure suit; but as it is claimed that the orders and decrees in the land grant cause were made purposely ambiguous to aid the St. Paul Company to claim what never was intended to be covered by that mortgage, it is proper to refer to the orders and decrees made in both causes at the same time as explanatory of the intention and meaning of the court in the particular language employed. I shall therefore give these various orders side by side, for convenience in comparison.

At the hearing of the two causes, which were heard and decided together, the district judge delivered a written opinion. I extract all that relates to the question of the rolling stock, viz:

"The legislation of this State was evidently with a view of enabling railroad companies, and especially the La Crosse and Milwaukee Railroad Company, to raise money in advance by bond and mortgage, for the purpose of building their road and procuring rolling stock. The directors of this company were given almost unlimited license to make bonds and mortgages, payable in any manner they might deem proper, and to pledge or mortgage their property as security. By the terms of the mortgages the rolling stock to be procured was pledged to secure the debt contracted for raising the means for its procurement.

"In equity those pledges should be sustained, and persons who purchased the company's bonds and furnished the means for procurement of the stock should be protected.

"And they also furnished the means for building the road, from which revenues have been derived to enable the company to procure the rolling stock.

"From the best consideration I can give the subject, *I think the rolling stock on the whole road is to be considered to be a fixture, and is pledged to the first mortgage of nine hundred and fifty thousand dollars, unless it can be shown affirmatively how much or what portion was procured by funds received out of the issue of land grant bonds, and the second mortgage bonds, or either of them.*

"*So much of the stock as can be shown to have been procured out of either of those issues, or out of the revenues of so much of the road as was built with funds arising out of those issues of bonds respectively, will pass with the sales on said mortgages.*"

For the entire opinion, see Record No. 280, p. 218.

This opinion determines that the rolling stock is all to be regarded as a *fixture upon the Eastern Division*, and all covered by the first mortgage, except that which was purchased with the money received on the issue of the land grant bonds, which would be considered *as a fixture upon the Western Division*. The language of the opinion is, that it is "*pledged to the first mortgage*." Turning to the record, it will be seen that nothing was pledged to that mortgage but the rolling stock pertaining to that division, everything else being excluded by the most unambiguous terms. (Record, 36.)

After the delivery of this opinion, and on the same day, orders of reference were made in the two cases as follows:

WESTERN DIV. CAUSE.	EASTERN DIV. CAUSE.
"And it is further ordered that the said masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by and included in this mortgage, and also in the first and second mortgages respectively."—Record, 72.	"And it is further ordered by the court that the said masters ascertain and report the whole amount of rolling stock on the whole road, and that they specify the quantity thereof *that is covered by and included in* the first mortgage, and also in this mortgage, and in the mortgage of Greene C. Bronson, James T. Soutter, and Shepherd Knapp."—Record, 89.

These orders of reference are to be read in the light of the preceding opinion. *Now what was the object to be attained by them?*

Take, for instance, the order in the Western Division cause, for what purpose was it made?

Manifestly not to ascertain the priorities of the land grant and the Bronson and Soutter mortgages as to the rolling stock; because, as the trustees of the Eastern Division mortgage were not parties, *no such thing could be determined.* The district court must be deemed to have had a practical end in view, which it had the jurisdiction to accomplish in that cause. The answer is obvious. The complainants in this Western Division cause had made the Milwaukee and Minnesota Railroad Company, the owner of the equity of redemption, a party defendant to their bill. It was therefore important to determine what amount of the whole rolling stock was included in the land grant mortgage; because the Milwaukee and Minnesota Railroad Company, after the decree and sale, would remain the owner of all the rolling stock on the whole road, except that which was covered by the land grant mortgage; and being a party defendant, it would be bound by the determination of that question. It was the duty of the court to settle this question *as between the parties to the cause* before ordering a sale. Otherwise it would have been selling a speculation, and not property the title to which it had ascertained.

Caldwell *vs.* Taggart. 4 Pet , 190, 201.

The language of the order is also decisive of this question. The masters are directed to ascertain how much of the whole rolling stock "is covered by and included in *this* mortgage, [the land grant mortgage] and in the first and second mortgages, [the Palmer and the Bronson and Soutter mortgages] *respectively.*" The word *respectively* implies separation, distribution, between the two divisions. Bear in mind, the Palmer mortgage and the Bronson and Soutter mortgage, conveyed the rolling stock pertaining to the Eastern Division only; the land grant mortgage conveyed only the rolling stock pertaining to the Western Division; but neither of the mortgages defined the amount or gave the description by which it could be determined how much each mortgage covered. The order, therefore, was made to determine in the land grant cause, and as between the parties to it, how much of the rolling stock pertained to the Western Division, and how much belonged to the Eastern Division. *What one mortgage covered the other did not.* For it is absurd to say that the land grant mortgage, which conveyed only the Western Division and the rolling stock "*pertaining*" *to that division*, also covered rolling stock which pertained to and "was to be regarded as a fixture" upon the Eastern Division. Hence, the language of this order is equivalent to saying, divide this rolling stock by ascertaining how much belongs to the Eastern Division, and hence is included in the Palmer and Bronson and Soutter mortgages, and how much of it belongs to the Western Division, and is included in the land grant mortgage.

Who in this court will have the face to say that his honor the district judge intended a thing totally different from what he said; and this too for the purpose of making out that he was trying to do something *entirely beyond his jurisdiction to accomplish, to adjudicate upon the rights of persons not parties to the cause.*

To these orders of reference the masters answer as follows:

WESTERN DIV. CAUSE.

"We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, five hundred and sixty-nine thousand six hundred thirty-five dollars and seventy-eight cents, and an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount to $623,235 78.

"And we have ascertained, and do further report, that of the said rolling stock, forty box-cars,

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"We have also ascertained the whole amount of rolling stock on the whole road. The amount thereof, at the cost price, was at the date of filing the bill of complaint in this cause, five hundred sixty-nine thousand six hundred and thirty-five dollars and seventy-eight cents. And an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount now on the road six hundred twenty-three thousand two hundred thirty-five dollars and seventy-eight cents, ($623,235 78.)

amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, and numbered 330, 332, 334, 336, 338, 340, 342, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, are covered by and included in the mortgage executed to the complainants, as set forth in the bill of complaint in this cause, the said cars having been purchased by the proceeds of a portion of the bonds to which this mortgage is collateral, and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the seventeenth day of August, A. D. 1857."—Record, 72.

"And we have ascertained, and do further report, that of the said rolling stock, forty box-cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, ($31,979 64) and numbered 331, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408 are covered by and included in the mortgage of Greene C. Bronson, James T. Soutter, and Shepherd Knapp, and no other. And all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the complainants' mortgage specified in the bill of complaint."—Record, 90.

These two reports, made by the same masters on the same day, leave no doubt as to their meaning and what they had ascertained. It is impossible to employ language more free from ambiguity; forty box-cars "are covered by and included in" the land grant mortgage. "The said cars having been purchased by the proceeds of a portion of the bonds to which this mortgage is collateral;" following the principle laid down in the previous opinion of the judge; "and *all* the remainder of the said rolling stock is covered by and included in" the Eastern Division mortgages. This is the report in the Western Division cause. In the Eastern Division cause the report is the same, though the masters have made it more emphatic by reporting that the land grant mortgage covers forty box-cars "and no other" of the rolling stock. The report in the Western Division cause is the same that it would be had the masters reported in the same phraseology, that "no other" of the rolling stock than the forty box-cars was covered by that mortgage. What was covered by one mortgage was not covered by the other; and when they reported that forty box-cars belonged to one mortgage, "and all the remainder" to the other division mortgages, the addition of the words "no other" to each sentence would not make the sense clearer. Such addition gives emphasis and belongs to rhetoric, but adds nothing to the clearness of the assertion.

But if it is possible to add anything to what has been done by the order of reference and the report of the masters, it is found in the exceptions taken by the respective parties to these respective reports. In the Eastern Division cause the complainants claimed that they hold all the rolling stock. They were therefore dissatisfied that the masters had given forty box-cars to the other division. In the Western Division cause the complainants claimed all the rolling stock, and were dissatisfied that the masters had given them only forty box-cars. In both causes, therefore, the complainants excepted to the report, as follows:

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"4th. For that the said master and special masters have in and by their said report certified that all the rolling stock on said road (except 40 box-cars which are specially named in said report) *was covered by and included in the first mortgage* upon the said railroad, *and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter*, and bearing date on the 17th day of August, A. D. 1857.

"Whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of fifty-three thousand six hundred dollars) was covered by *and included in the mortgage given* to the said complainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, 105-200 thereof was covered by the mortgage described in the complaint, and that to that extent the complainants' said mortgage was a first lien thereon."—Record, 75.

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"19th. For that the said masters, in their said report, have certified that of the rolling stock forty box-cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and ninety-nine dollars and sixty-four cents, and numbered 330, 332, &c., &c., *are covered by and included in the mortgage to Greene C. Bronson, James T. Soutter, and Shepherd Knapp, and no other*; whereas the said masters should have certified *that the said rolling stock was covered by and included in the mortgage of the complainants* in this action."—Record No. 132, last term, p.

It is manifest that the complainants in these causes, while they differed upon the question as to how much of the rolling stock was "included in and covered by" their respective mortgages, nevertheless agreed in this, *that what "was included in and covered by" one mortgage, was not "included in and covered by" the other.* The complaint that is made by each of these exceptions is, that what the party excepting claimed to hold had been decided by the master to be *included in the other mortgage.*

Take now the exception in the Western Division cause, as that is really the only one that is material here.

The exception complains that the masters have reported that all but forty box-cars "was covered by and included in the first mortgage," &c. And this is the only objection taken to what they *did report.* How were the complainants affected by this report, except upon the ground that what was included in the first mortgage belonged to the Eastern Division, and consequently was not covered by their mortgage, which only held the rolling stock belonging to the Western Division.

Mr. Cary now claims that all the rolling stock *was* included in the first mortgage, *and in his also,* and that his mortgage is a subsequent lien, &c., the first mortgage being the prior lien upon the rolling stock. Had he entertained this idea when this exception was drawn, he would have excepted *for that* the masters had reported that the rolling stock, except the forty box-cars, was covered by the first mortgage only; whereas they ought to have reported that it was also included in the land grant mortgage as well as in the first mortgage.

The exception then says the masters ought to have done two things, which they had not done—that is, (1) "certified that all the rolling stock * * *was covered by and included in the land-grant mortgage.*" The addition of the words "and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens," adds nothing to what preceded; because *if it was included* in that mortgage, all conceded and still concede that mortgage to have been the first lien upon it. The question is *whether it was included in that mortgage at all;* not, what is the effect of the mortgage upon it, *if it was included.* And (2) that of the rolling stock purchased by the receiver 105-200 thereof was covered by the land grant mortgage

After the argument of these exceptions, the court delivered its opinion in writing, adhering to the principles of its former opinion. I quote all that relates to this subject. *Page* 251 *of printed Record No.* 280.

"In obedience to the order of reference, the masters inquired into the quantity of rolling stock covered by this mortgage. *They report that forty box-cars,* costing thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, giving their respective numbers, *were purchased with funds raised on the bonds in this mortgage.* They also report that the rolling stock on the road cost $623,235 28, *and that all but those box-cars are covered by the first and second mortgages.* The complainants except to this part of the report, *and claim the whole rolling stock. They found their claim upon the grounds that the rolling stock is personal property,* and that the first mortgage was not filed as a chattel mortgage, and is therefore void as to the rolling stock, and that their mortgage was the first in date after the act of October 10, 1856, declaring the rolling stock to be real property. I do not think the statute for filing chattel mortgages is applicable to this species of property in actual use upon a railroad.

"The legislation of this State was evidently with the view of enabling railroad companies, and especially the La Crosse and Milwaukee Railroad Company, to raise money in advance, by bonds and mortgage, for the purpose of building their roads and procuring rolling stock. The directors of this company were given almost unlimited license to make bonds and mortgages, payable in any manner they might deem proper, and to pledge or mortgage their property as security. By the terms of the mortgages, the rolling stock to be

procured was pledged to secure the debt contracted for raising the means of its procurement. In equity those pledges should be sustained, and the persons who purchased the company's bonds and furnished the means for the procurement of the stock should be protected. And they also furnished the means for building the road, from which revenues have been derived, to enable the company to procure rolling stock. This matter is fully settled as authority to this court in the case of Pennock *vs* Coe, 23 Howard, 117. The rolling stock was procured by the company as owners, and was fitted and adapted to the road as the means of operating it; and so long as it is thus used it should be considered as fixtures, even without statute law. The first mortgage covered all the after-acquired rolling stock, except such as should be proven to have been purchased with funds raised upon subsequent mortgages. To that extent those mortgages should have a superior equity. For these reasons the exception will be overruled. *But the decree will, in addition to the forty cars reported by the masters, allow to this mortgage its share of all the rolling stock purchased and procured by the receiver, costing* $147,942, in proportion to the net revenues.

"Before the appointment of the receiver the revenues of the west end of the road did not more than cover operating expenses. Since then they have so increased as to entitle these bond-holders to a proportion of the rolling stock procured by the receiver. *It does not appear that any of the avails of the second mortgage bonds were applied to the purchase of rolling stock.*"

This opinion shows precisely what claim was made by the complainants in the court below in regard to the rolling stock, and the ground of that claim. After stating the report, as to rolling stock, viz, that only forty box cars were covered by the land grant mortgage, because they "were purchased with funds raised on the bonds in this mortgage," the court says: "The complainants except to this part of the report, *and claim the whole rolling stock.* They found their claim upon the grounds that the rolling stock is personal property, and that the first mortgage was not filed as a chattel mortgage, and is *therefore void as to the rolling stock*, and that their mortgage was the first in date after the act of October 10, 1856, declaring the rolling stock to be real property. I do not think the statute for filing chattel mortgages is applicable to this species of property in actual use upon a railroad." For these reasons the court overruled the exception. (Record No. 280, p. 251.) Here was no claim that the land grant mortgage was a second mortgage as to the rolling stock pertaining to the Eastern Division; but that the first mortgage *was void* as the rolling stock, that is, did not include it at all; and the land grant mortgage was a *first mortgage* upon all the rolling stock.

The court, in its opinion, (Record No. 280, p. 251,) also states why the land grant mortgage should be deemed to cover a proportion of the rolling stock purchased by the receiver, and no part of that which was on the road when the receiver was appointed. The court says: "Before the appointment of the receiver the revenues of the west end of the road did not more than cover the operating expenses. Since then they have so increased as to entitle these bondholders to a proportion of the rolling stock procured by the receiver. It does not appear that any of the avails of the second mortgage bonds were applied to the purchase of the rolling stock." From this opinion then, it resulted, logically and necessarily, that all the rolling stock on the road when the receiver was appointed, except the specified *forty box-cars*, was to be regarded as fixture upon the Eastern Division, that the rolling stock purchased by the receiver should be divided between the two divisions in proportion to their respective net earnings: and that the second, or Bronson & Souther mortgage, should not be allowed to cover any of the rolling stock, because none of the bonds secured by that mortgage had been used for the purchase of rolling stock. And on the same day this opinion was delivered, January 7, 1862, the court made orders in the two cases, in accordance with the opinion, as follows:

WESTERN DIVISION CAUSE.

"This day came the parties, by their counsel, and on consideration of the several exceptions to the report of the masters, and the arguments of counsel, it is ordered by the court that the first, second and third exceptions of complainants to said report be, and hereby are, overruled.

"And it is further ordered by the court *that the fourth exception* of complainants be, and is hereby overruled, except as to the forty box cars *which are* covered by this mortgage. And it is further ordered by the court, that on said exception, the said report be so modified that *all the other stock* that was on said road when the receiver was appointed, *except the said forty box-cars, is covered by and included in the first mortgage of the road from Milwaukee to Portage City;* and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147.943 62, be applied to the *said first mortgage*, and *the mortgage in this bill*, in proportion to the net revenues on such portions of the road said mortgages respectively covered, since the appointment of the receiver."—Record, 78.

EASTERN DIVISION CAUSE.

"This day came the parties, by their counsel, and on consideration of the exceptions of the parties to the report of the masters, and of the arguments of counsel, it is thereupon ordered by the court that all the several exceptions of complainants to said report be, and hereby are, overruled. * * * * *

"And it is further ordered by the court that the report of the masters, allowing forty box-cars to be covered by the land grant mortgage of said company to Bronson, Soutter and Knapp, be, and hereby is, confirmed. And that the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box-cars, is covered by and included in the first mortgage of the said company from Milwaukee to Portage City. And that all the rolling stock on said road that has been purchased or procured since the court has had possession by its receiver be applied *pro rata*, in proportion to the revenues of the road, to the first said mortgage and the said land grant mortgage."—Record, 94.

These several documents, the order of reference, the report of the masters, the exceptions to that report, and order of the court upon the exceptions, must be considered together, for each after the first is an answer to the one which preceded it; and each is to be construed in the light of what preceded it, as an answer by letter is always to be explained by the letter to which it is a reply.

And these documents, which are of record, are as unambiguous as the opinion, and conduct to the same result.

The fourth exception taken by the counsel for the land grant mortgage contains these words: "Whereas the said masters ought to have certified that *all the rolling stock* on said road (except that purchased by the receiver), *was covered by and included in the mortgage given to the said complainants*, and described in the bill of complaint in this cause." To this the court replies: "And it is further ordered by the court, that the *fourth exception* of the complainants *be, and is hereby, overruled*, except as to the forty box-cars *which are* covered by this mortgage." Can it be contended for a moment, that after the exception which *contained this claim* on the part of the land grant mortgage had been *overruled*, that mortgage can still claim to cover "*all the rolling stock.*" The whole of this *fourth exception* is overruled (except the claim to the forty box-cars;) no pretension set up in it is admitted; even the division of that portion purchased by the receiver, as claimed by the counsel, is denied, and a different division ordered—the court *denies the claim* that the land grant mortgage *covers all the rolling stock;* and thus denies that it is "*a first and prior lien, superior to all other liens;*" it denies that it covers 105-200 *of the portion purchased by the Receiver*—it says: "The fourth *exception is overruled except* "*as to the forty box-cars.*" Thus the whole claim on behalf of the land grant mortgage is swept away.

The court having in each of these causes determined the precise amount of the rolling stock which was covered by the respective mortgages, decrees were made in both causes January 13, 1862. The decrees are in the ordinary form and immaterial here, except in the description of the premises ordered to be sold; and in that respect they are as follows:

WESTERN DIVISION CAUSE.

DECREE.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the

EASTERN DIVISION CAUSE.

DECREE.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the

mortgage above referred to, or from the bill of complaint in this cause, is as follows, viz:

"All and singular the several tracts, pieces or parcels of land which now are, or may hereafter be or constitute, the site of the roadway, turnouts, engine houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute, or may hereafter constitute, or be a part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also, all and singular, the superstructure of said road, whether now made or to be made hereafter. And all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made, or to be built and made hereafter. And also, all and singular, the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been, or may hereafter be, procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been, or may hereafter be, procured for or used in connection with said roads, or either of them. And also, all and singular, the rights, liberties, privileges, and franchises of said railroad company of every kind and description relating to said road."

Also, "all and singular, the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the Legislature of Wisconsin hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix river or lake, estimated to be about one million of acres of land, together with, all and singular, the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed; and it is hereby declared to be the intention of the parties to these presents to convey and to vest in said parties of the second part all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroads had already been fully constructed and equipped, and the particular lands granted by the foregoing act of Congress and the Legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix river or lake, had already been designated and conveyed to said railroad company."

With forty box-cars, numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, and such portion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver.

The remaining rolling stock is subject to prior mortgages.—Record, 78.

mortgage above referred to, or from the bill of complaint in this cause, is as follows, viz:

"All and singular the railroad of said company, commencing in the city of Milwaukee and running thence to Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation; and also the railroad of said company, (as well that part which has been constructed as that part which remains to be constructed,) from Watertown, by the way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one-half of which last-mentioned road, being the part between Watertown and Columbus, has been constructed and is now in full operation, including, all and singular, the several tracts, pieces, or parcels of land which now are or may hereafter be, or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all the other land and real estate which now constitute, or may hereafter constitute or be a part of or appertain to said railroads or either of them. And also, all and singular, the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether now built or made, or to be built and made hereafter.

"And also, all and singular, the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said railroads or either of them; and all the materials, tools, implements, and utensils, and other personal property which have been or may hereafter be procured for or used in connection with said railroads, or either of them.

"And also, all and singular, the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads, from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, aforesaid.

"And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part, all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped. Said railroad from Milwaukee to Portage City is subject to a first mortgage on the same of ten thousand dollars per mile, amounting in the aggregate to nine hundred and fifty thousand dollars; the first eighteen miles of said road from Milwaukee, westward, is subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of said road, westward of the eighteen miles, is subject to a second mortgage of two hundred thousand dollars."—Record, 95.

On a former argument of this question, it was claimed by Mr. Cary that this quotation from the mortgage in the decree in the land grant cause amounted to a direction to sell all the rolling stock on the whole road; and that the forty

box-cars being specifically ordered to be sold, the closing sentence of the decree meant, as to all but the forty box-cars the land grant mortgage was a subsequent lien.

1. If the decree were to be taken independent of all former proceedings in the cause, this general language quoted in the decree would mean there precisely what it meant in the mortgage, and would include no more; and I have already shown that in the mortgage *it covers only the rolling stock* pertaining to the Western Division. And without aid from the prior proceedings, it is submitted that this language in a decree would convey nothing, but would be utterly void for uncertainty; or, at the least, would require supplementary suit to determine what was included in the description.

A mortgage conveying "all the real estate I now own in Milwaukee," might be a good mortgage. But if a bill were exhibited to foreclose it, it would have to show that when I executed the mortgage, I was the owner of *certain* real estate; and then the decree would be, not to sell all the real estate I owned at the making of the mortgage, but the real estate, by exact and certain description, which the court had determined I did own.

2. But a plainer answer to this argument is, that the decree is only a part of the proceedings in the cause. What was vague and uncertain in the mortgage was rendered definite and certain by the reference, report, and order of the court thereon. Suppose, in the decree, after reciting that in the mortgage the premises were described thus and so, giving a quotation from the mortgage, the court had also recited that, for the purpose of ascertaining how much rolling stock was included in this general description, reference had been made to masters, who had reported that only forty box-cars were included, and the court on exceptions had confirmed the report. This would have made the matter entirely clear. Now it is submitted that those former proceedings have the same effect in the cause, upon the rights of the parties, as if they had all been repeated in the decree. This is precisely why, if you wish to introduce a decree in evidence in any other cause, you must produce not the decree only, but a transcript of the whole proceedings, so that the court may determine what is the effect of the whole record. The court does not pretend that those general words are a proper description of what was to be sold. The decree recites a fact merely, that the premises were described in the mortgage in a certain way. This description was sufficient as to the lands, roads, and franchises, but worthless as a description of rolling stock. When the decree proceeds to order sold the forty box-cars, numbered 330, &c., &c., and a certain proportion of rolling stock purchased by the receiver, and comes to a full stop or period, then the decree adds the adjudication *that the remaining* rolling stock is subject to prior mortgages, as the reason why only forty box-cars were decreed to be sold. That the court regarded the general language quoted worthless as a direction to sell rolling stock, is shown from the fact that after all that quotation, the court proceeds to direct the sale of the forty box-cars it intended to have sold. Upon the argument of Mr Cary, that all the rolling stock was described in the general language, the court, by proceeding afterwards, with its direction that this should be sold, "*with forty box-cars, numbered*," &c., must be deemed to have given them forty box-cars in the decree not covered by the mortgage. For it is impossible not to see that the "forty box-cars" are ordered to be sold in addition to what was included in the former paragraph in the decree—that is, in addition to what was included in this quotation in the mortgage.

3. But a more conclusive answer still remains. In the Eastern Division cause the court had determined that no rolling stock was "included in and covered by" the Bronson and Soutter mortgage on the Eastern Division. Yet it will be seen that the decree in this cause quotes the same language from that mortgage that the land grant decree quotes from the land grant mortgage. It is manifest, therefore, that in the Eastern Division cause the court did not intend, by quoting the general description from the mortgage, to order any rolling stock to be sold. And in the Eastern Division decree, the general language quoted from the mortgage is not followed, as it is in the land grant decree, with

direction to sell any rolling stock. In the land grant cause the court had determined that forty box-cars were included in that mortgage; and after the general language in the decree, it ordered the forty box-cars sold. In the Eastern Division cause, the court had determined that no rolling stock whatever was "included in and covered by" the mortgage, and hence, after the general language, there is no direction to sell any rolling stock whatever.

4. If I am right in the view I take of the proceedings in the land grant cause, down to and including the decree, I need go no further, because the decree was the last act the district court had jurisdiction to perform in this cause. The subsequent orders are *coram non judice.*

See brief ex parte Fleming, No. 5. Original docket this term.

It is well settled that a sale in fact by a marshal of what he is not authorized *by the decree* to sell *is a mere nullity—absolutely void*—although it may be confirmed by the court.

Laverly *vs.* Moore, 32 Barb. N. Y., 347.
Shriver *vs.* Linn, 2 How. U. S., 43.

It appears from the record in the land grant cause that Mr. Cary, after having been defeated before the masters, and after having appealed from the masters to the court and been beaten again, appealed from the court to the marshal, and succeeded, *so far as that functionary was concerned.* It is equally manifest, however, from the subsequent orders of the court, that the judicial performance of the marshal was never brought to the knowledge of the court, or if it was, it was treated by the court as a mere nullity, as it undoubtedly was; and in all the subsequent orders of the court the court followed its own views and decree, regardless of the fact that the marshal had attempted to override the decree, and give to this mortgage what the masters and the court had decided was not included in and covered by it.

It appears from the report of sale that the marshal first sold what he was directed to sell; that is, the Western Division, *with forty box cars,* and *a proportion* of the rolling stock *purchased by the receiver;* and that he then proceeded to sell the rolling stock belonging to the Eastern Division, which was not included in the mortgage, which the masters and the court had *determined* was not included in or covered by the mortgage, but *was included in and covered by* the Eastern Division mortgage. This irregular conduct of the marshal was not discovered by the counsel for the Milwaukee and Minnesota Railroad Company, nor brought to the knowledge of the court by its counsel, until long after the St. Paul Company had been in possession of the whole road and rolling stock, under the order of June 12, 1863.

May 5, 1863, the sale was confirmed by order of the district court in the Western Division cause, as follows:

"This day came the parties, by their counsel, and the argument of the several exceptions to the sale of the mortgaged premises by the marshal being concluded, it is ordered by the court that said exceptions be, and hereby, are overruled.

"And it is further ordered and decreed by the court, that the said sale so as aforesaid made, be, and hereby is, confirmed, and that the marshal make a deed to the purchasers"—Record, 84.

On the 7th May, 1863, the St. Paul Company applied to the court to be let in possession of the Western Division and rolling stock *which it had purchased;* and also to be let into possession of the Eastern Division and rolling stock, which it had not purchased; and for leave to operate the same, as well as its own division. To this petition the court that day answered by the following order:

"Whereupon it is ordered by the court (Mr. Carpenter in behalf of the Milwaukee and Minnesota Railroad Company, and Mr. Ryan in behalf of William Crawshay and Orville Oddie objecting) that the receiver deliver over to the said

Milwaukee and St Paul Railway Company the said railroad and appurtenances between Portage City and La Crosse, *and the rolling stock and property specially described in the decree.*

"And it is further ordered by the court, that a full and perfect inventory be taken by the receiver of all rolling stock *other than the forty box cars specially mentioned in the decree*, and of all personal property belonging to the said La Crosse and Milwaukee Railroad Company, including such as have been procured by the receiver and now on hand, and that he make report of the same on the eighth day of June next.

"And as, in pursuance of the act incorporating the La Crosse and Milwaukee Railroad Company, a continuous road has been constructed and operated between La Crosse and Milwaukee, and the interest of the public requiring that the said road, as constructed and operated, shall continue to be so operated, it is ordered by the court, (reserving the right to rescind, change, or modify this order at any time hereafter,) that the said Milwaukee and St. Paul Railway Company, and the receiver, who continues to be the receiver of the eastern end or division of said La Crosse and Milwaukee Railroad, between Milwaukee and Portage City, jointly operate said road between La Crosse and Milwaukee without interruption, and that the said Milwaukee and St. Paul Railway Company, and the said receiver, jointly, employ all the agents and persons necessary for the proper operating of said road; that the revenues of said road be paid to the receiver as heretofore, who shall keep all accounts and books for the inspection of the said company, and said company may keep duplicate books, and that all payments and disbursements for necessary expenses in operating said road shall be paid out of the joint fund, each division of said road to be entitled to its proportion of revenue, and to be charged with its proportion of disbursements, and that the said receiver pay coupons of bonds in prior mortgages as heretofore."—Record, 104, 105, 106.

This order gave the St. Paul Company possession of all it had purchased, although, under the possession, that company was required to operate its road in connection with the Eastern Division, still in the hands of the receiver. The order to deliver possession is carefully drawn, and confined to the Western Division and the forty box cars "*specially described in the decree.*"

On the 12th June, 1853, the court had determined to permit the St. Paul Company to operate the Eastern Division in connection with its own division, and to release the receiver from all duty in that behalf. Two orders were therefore made on that day, as follows:

WESTERN DIVISION CAUSE.

"On consideration of the said petition of the Milwaukee and St. Paul Railway Company, and of the arguments of counsel, it is ordered by the court that there be delivered over to the said Milwaukee and St. Paul Railway Company, all and singular, the railroad between the city of La Crosse and Portage City, its road-bed and track, with its depots, station-houses, engine-houses, and all other property belonging to said railroad between the said points: and the forty box-cars mentioned and described in the decree

"And also the share or proportion of the rolling stock and personal property purchased by the receiver, as mentioned in the decree

"And also, *subject to other or previous liens or claims*, the possession of the rolling stock on hand when the receiver took the same under the order of the court. And it is further ordered by the court, that the said receiver be and hereby is, discharged as such from the management and control of the said Western Division of said railroad under the appointment in this case, subject, however, to the final settlement of his accounts, *and subject to the orders* made or to be made in this case, and in the other cases in which

EASTERN DIVISION CAUSE.

After reciting the petition of the St. Paul Company, &c., &c.

"It is thereupon ordered by the court that the order appointing a receiver in this case be modified in the manner following, *subject to any further or other order rescinding, altering, or modifying this order now here made.* That the receiver let the said Milwaukee and St. Paul Railway Company into the possession of the Eastern Division of the La Crosse and Milwaukee Railroad from Portage City to Milwaukee, with the appurtenances and property and rolling stock thereto belonging. And that the said Milwaukee and St. Paul Railway Company, subject to further order or orders of the said court, operate said Eastern Division of said railroad in connection with the said Western Division thereof, so that one continuous line of railroad between La Crosse and Milwaukee may be operated and conducted as directed in the original charter of the La Crosse and Milwaukee Railroad Company, without hindrance, interruption, or diversion, the same as if the whole line of road continued to be in one company, in pursuance of said charter and not otherwise.

he was appointed or may hereafter be appointed."—Record, 104, 106.

"And it is further ordered by the court that the said Milwaukee and St Paul Railway Company shall at all times allow and permit the receiver, or such other persons as may be at any time appointed for that purpose, to have daily access and examination of the records, books, papers, accounts, proceedings, receipts, and revenues, and also of the transactions of the said Milwaukee and St. Paul Railway Company, and of its board of directors, in relation to the business and operation of the whole line of road, and that the said railway company shall, out of the revennes of said road, *keep the said Eastern Division and all the rolling stock in good order*, and defray all running and other necessary expenses, and at the end of every month deliver to the said receiver, or such other person as may be appointed, a full and detailed account of all revenues arising on the whole road, and of all necessary disbursements out of the same, and pay over monthly to the receiver the proportion of the said Eastern Division of the net revenues of the said railroad. And that the said receiver make monthly returns as heretofore of his accounts into court, and disburse the moneys by him received from time to time in the payment of liens and debts of the said La Crosse and Milwaukee Railroad Company, according to their priorities and equities.

"And it is further ordered by the court, that before the said Milwaukee and St. Paul Railway Company be permitted to have possession under this order, the said company, by its constituted officers, shall enter into bond to the United States for the use and benefit of all interested, with sureties to be approved by the court, in the penalty of one hundred thousand dollars, conditioned that the said company will faithfully comply with this order of court this day made, and any subsequent orders relating to the operation and management of the said railroad between La Crosse and Milwaukee, and will keep said road and the rolling stock and property in good order, and shall manage and conduct the same to the best advantage of the public and the La Crosse and Milwaukee Railroad Company, and shall make monthly returns and pay over the net revenues of said road, according to this order." Record, 101.

The order in the Western Division cause deserves particular attention. It orders the receiver:

(1) To deliver to the St. Paul Company full possession of the Western Division, "*and the forty box-cars mentioned and described in the decree.*"

(2) To deliver also full possession of the "share or proportion of the rolling stock and personal property purchased by the receiver, *as mentioned in the decree;* thus terminating the joint occupancy with the receiver with which that possession had been burdened by the order of May 7.

So far the order is absolute, and shows, by the repetition of the words at the end of each clause, "*mentioned and described in the decree,*" that the court was delivering possession of what the St. Paul Company had *acquired title to* by its purchase under the decree.

Then the order proceeds to direct the receiver to deliver also, subject, however, to all "OTHER or *previous liens* or CLAIMS, the whole rolling stock on hand when he was appointed; that is, the remainder of the rolling stock, except the forty box-cars, which belonged to the Eastern Division, and of course *was not mentioned and described in the land grant decree;* therefore this clause is not followed, as the others were, by these words, "*mentioned and described in the decree.*"

Considering the careful and guarded language of this order, it is impossible not to see that the court was drawing the distinction, in what it ordered to be

delivered to the St. Paul Company, between that which belonged to them by their purchase under the decree—that is, the Western Division, the forty box-cars and the proportion of rolling stock purchased by the receiver—and that which was delivered to them temporarily, but *not by virtue* of their purchase *under the decree.*

The court, in substance, said, "Take absolutely all that was purchased by you under the decree, the Western Division, forty box-cars, and the proportion of rolling stock purchased by the receiver; this you have purchased. The remainder of the said rolling stock has been ascertained to belong to the Eastern Division, and it must there remain; but we give it, *with the Eastern Division,* into your possession temporarily, that the whole may be operated together."

2 Turn now to the order in the Eastern Division cause. The court had decided that all the rolling stock, except forty box-cars, was included in the Eastern Division first mortgage; that is, that it belonged to the railroad *between the limits of Milwaukee and Portage;* because such is the description in that mortgage. The court had determined for reasons of public policy, &c., set forth in the preamble to this order, to give to the St. Paul Company the possession of the Eastern Division mortgage premises temporarily. This order gives to the St. Paul Company the possession of the Eastern Division, "*and rolling stock thereto belonging,*" but subject nevertheless "*to any further or other order rescinding, altering, or modifying this order now here made.*"

How absurd to pretend that the court in this order regarded the rolling stock pertaining to the Eastern Division as having been purchased by the St. Paul Company. Did a court ever yet put a purchaser into possession after final decree and confirmation of sale, "*subject to any further order rescinding*" *the same?* This right reserved to the court to *rescind* the order giving the St. Paul Company the Eastern Division "and the rolling stock belonging thereto," is conclusive that the court was granting to that company a *favor* and not a *right;* a temporary possession, not a title.

It is to be kept in mind that there is no rolling stock covered by and included in a mortgage, except it is a part of the premises described in the mortgage. The Eastern Division first mortgage granted the rolling stock pertaining thereto "between the limits" of Milwaukee and Portage. Therefore, when the court decided that all the rolling stock that was on the road when the receiver took possession was covered by and included in that mortgage, it thereby decided that it was rolling stock pertaining to the Eastern Division "between the limits aforesaid," because that mortgage expressly declared that it covered no other rolling stock or property; and the court also decided that the said rolling stock pertaining to said Eastern Division was to be regarded as a *fixture* upon that division.

See the premises of that mortgage, Record, 36.

Therefore, the order that gave the St. Paul Company temporary possession of the Eastern Division "*and the rolling stock belonging thereto,*" gave all the rolling stock on the road when the receiver was appointed, except the forty box-cars, and this possession was expressly given, *subject to be rescinded by the court.*

In an opinion delivered by his honor, the district judge, at the April term, 1864, and published May 12, 1864, nearly a year after these orders, the judge says:

"The first duty of the court is to secure the interests of the public, under the grant of the charter of the La Crosse Company. The second duty is to protect the rights of the lien creditors and the parties litigant. The receiver was appointed for these two purposes.

"For this purpose the orders of the 12th of June, 1863, in this [Eastern Division] case and in the Howard case, modifying the original orders, appointing the receiver, were made. The Milwaukee and St. Paul Company were allowed by those last orders to operate temporarily the Eastern Division of the road in connection with the Western Division, of which they were owners, for

the sake of economy in operating the road, *to secure the use of all the rolling stock on the whole line, and to restrain the St. Paul Company from diverting trade and travel from the Eastern Division.* It was known that the St. Paul Company were about to connect their division, from Portage City, with the Watertown road and thence to Milwaukee, *which might affect the Eastern Division.*

"The order allowing that company to operate the Eastern Division, subject to the control of the court and the supervision of the receiver, and under heavy bonds, with adequate security, *prohibited them from putting a car on the extension from Portage, or on any other road east of that point.* I considered it a proper duty for the public and the parties *to secure the use of a continuous route according to the charter, without interruption or deviation of trade or travel* between the termini of the road."—Record.

Here is the opinion of the judge who made these orders as to what was his intention in making them.

It is to be remembered that the order of the court upon the master's report declared that all the rolling stock on the road when the receiver was appointed, and the proportion of rolling stock purchased by the receiver and not belonging to the land grant mortgage, belonged to the Eastern Division first mortgage; and the language which gave the Eastern Division mortgage that proportion of stock is identical with that which gave the Eastern Division mortgage all of the original stock, except the forty box-cars. If the St. Paul Company may take one class of stock, it must take the other, by irresistible reasoning, and leave the Eastern Division without a car. Yet the judge, in this opinion, says his orders of June 12, 1863, *restrain and prohibit* the St. Paul Company from *taking a car* from the Eastern Division.

It is submitted that the mortgages, the proceedings of record in both these causes, and the published opinion of the judge, all concur in establishing the following propositions:

1. That of the seven mortgages given by the debtor company, the Barnes mortgage alone included and covered rolling stock belonging to both divisions.

2. That to ascertain how much rolling stock was included in the land grant mortgage, as pertaining to the Western Division, the court referred it to masters, who reported that forty box-cars only were "covered by and included in" that mortgage; and that all the other rolling stock was covered by and included in the Eastern Division mortgages, or, in other words, pertained to the road "*between the limits*," Milwaukee and Portage, and was a fixture thereon.

3. That the trustees in the land grant mortgage excepted to the master's report, claiming that that mortgage covered and included all the rolling stock; that the court overruled the exception, except as to the forty box-cars; and confirmed the master's report so far as to hold that all the rolling stock, except the forty box-cars, was covered by and included in the Eastern Division first mortgage, which described, as we have shown, only the rolling stock "pertaining to the road between the limits aforesaid," Milwaukee and Portage.

4. That the decree in the land grant cause directed the sale of only the forty box-cars, and recited and determined that all the other rolling stock was covered by the Eastern Division mortgages, and not by the land grant mortgage.

5. That although the marshal presumed to sell all the rolling stock, and that sale was confirmed, yet that the court, in all its subsequent orders, recognized the right and title of the St. Paul Company to the forty box-cars only, and only gave the other rolling stock to be held temporarily, not by right or title, but as the receiver of the court, under bonds to keep the same in repair and obey any order the court might make rescinding the order which gave this temporary possession. (Record 103, form of bond given.)

Or, to sum up the result of all in a single proposition, the St. Paul Company has acquired a title to forty box-cars and no more of the rolling stock in question.

III.—IS THE ROLLING STOCK A FIXTURE?

Rolling stock put and used upon a railroad becomes an accessory, if not a fixture, and passes with a conveyance of the road and franchises *even without mention* or specific description. These mortgages were therefore not void for uncertainty, as regards the rolling stock. And the court in the land grant cause having ascertained how much of this rolling stock was appurtenant to the divisions respectively, the rolling stock, so far as regards the parties to that cause and the purchaser under that decree, must be held to belong, forty box-cars to the Western Division, as an accessory or fixture, and all the remaining rolling stock, to the Eastern Division, or a fixture thereon.

This proposition is so conclusive of the right to this rolling stock, that I ask a careful consideration of it.

The term *fixture* was early seized upon by legal writers to supply a deficiency in their technical terminology, but was not entirely reclaimed from its popular use and fixed in that strictness and uniformity of meaning requisite to scientific certainty, and it has, as used by legal writers, continually fluctuated between a technical and its popular use. We have, therefore, many kinds of fixtures; and many exceptions and qualifications to each kind. A fixture is one thing between landlord and tenant; a different thing between vendor and vendee; is one thing in the economy of trade; another for the purposes of agriculture. Originally the term denoted those movable things which had become immovable by connection with the freehold. But presently it became to mean to those things that, although attached to the freehold, could under certain circumstances be removed. In its popular use it meant something affixed or fastened to the freehold; and in the early cases, and many of the later ones, we find the popular definition of the term sweeping everything before it; and an article was held a fixture or not, from the presence or absence of a screw fastening it to the floor.

By the great majority of cases, ancient and modern, there is no doubt that a fastening was essential to constitute the thing in question a part of the freehold; and nothing kept in place by mere gravitation was held to be a fixture. It is equally true that, from the first, we have the doctrine of constructive annexation equally well established. *In Liford's case*, 11 *Co.* 50, it is said to have been decided, in the fourteenth year of Henry VIII, that a millstone, removed from a mill to be picked, was nevertheless constructively a part of the freehold, and passed by deed conveying the mill. In England title deeds have been held fixtures; and deer in a park, and fish in a pond, have been held to pass with the estate.

The right to remove articles as fixtures has been carried further in favor of tenants and to encourage trade than any other cases; yet this right has been somewhat limited; and it has been held that where an engine, in no way attached to the freehold, could not be removed without injury to the building in which it was set up, that the tenant could not remove it. And there are cases in England of more recent date, still further tending to put this subject upon a reasonable and not technical or philological ground, and to hold that a thing is to be regarded as real or personal property according to its relation to, and connection in use with, the freehold, rather than from the manner in which that connection may be accomplished. And it has been expressly decided that actual *fastening* is not necessary to make a thing part of the estate.

In the United States we have three different rules, established by different States.

1. To constitute a fixture, so as to pass with the real estate, it must be so *fastened* to the estate that its removal would seriously injure the freehold, beyond the loss of the thing removed.

2. If the chattel is essential to the use of the real estate, and actually, though slightly attached, it will pass with the freehold.

3. If the thing *be essential to the use of the real estate*, and has uniformly been used with it, then it passes, *though not fastened to it.* As an original proposi-

tion, the third rule seems most satisfactory and philosophical. Take, for instance, a manufacturing establishment. The building is constructed to receive the various machines necessary for carding wool, spinning yarn, weaving and dressing cloth, and this business is carried on in the building. One machine is so light, or its motion so violent, that it must be steadied by some fastening to the floor; the next is heavy enough to keep in place by its own weight. Now, there is no reason in saying that one machine will, and the other will not, pass with the freehold. Both are essential to the same business, one is useless without the other, and both are in the mind of the purchaser when he buys the establishment. It seems absurd to say that to be sure of getting all the machinery, he must nail it down to the floor, when perhaps fifty men could not start it a hair. The purpose for which the thing was constructed, and the manner in which it was enjoyed in connection with the freehold, should determine whether it is real or personal estate.

Following this view, in Farrar *vs.* Stackpole, 6 Green., 157, it was held that where machinery was essential to the purposes for which the building in which it was used was erected, that this fact alone constituted it real estate, whether nailed down or held down by the laws of gravitation.

Lawton *vs.* Salmon, 1 H. B., 259.
Farris *vs.* Walker, 1 Bailey, 541, (S. C.)
Voorhies *vs.* Freeman, 2 W. & S., 46.
Goodrich *vs.* Jones, 2 Hill, 142.

Pyle *vs.* Pennock, 2 W. & S., 390, are to the same effect, although a far greater number of cases could be cited to the contrary, both from England and American Reports.

In Walker *vs.* Sherman, 20 Wend., 136, actual *fastening* was held essential; but in the more recent case, Snedeker et al., *vs.* Warring, 2 Ker., 170, this distinction is overruled, and the law of fixtures put upon the sensible ground, according to the doctrine in the above cases. In the latter case, a statue and sun-dial were held part of the real estate. The court say: "If the statue had been actually affixed to the base, by cement or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. *But is that circumstance* controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. *Its destination, the intention of the person making the erection*, often exercises a controlling influence; *and its connection with the land* is looked at principally for the purpose of ascertaining whether that *intent* was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands." We come now to give this law of fixtures an application to a new subject-matter.

Here is a corporation created by law to build, equip, and operate a railroad, and for no other purpose. It mortgages its road-bed, between certain limits, all its depots and station buildings, its right of way, *and all appurtenances*, between those limits; *and all the franchises, privileges, and rights* of the company of, in, and to or concerning the same. The road is useless without the rolling-stock. Here is a case, then, falling fully within the principle of Farrar *vs.* Stackpole, Voorhies *vs.* Freeman, and Pyle *vs.* Pennock. The real estate is worthless without the rolling stock, which has been used *only* upon the road; and the rolling-stock, so essential to the use of the road, utterly worthless for any other or *different* use. We have already seen the *senseless* fiction of *fastening* done away with; and we have but to apply the principles of the cases cited, and we shall come to the result that the rolling-stock is in the nature of a *fixture*, and, as such, must be conveyed by the mortgage conveying the estate. True, it has not *exactly* the same connection with the realty that the statue had in Snedeker *vs.* Warring; it is not held or kept in *one* place by fastenings, or

by its weight. But this circumstance is of no consequence if the principle deducible from the cases above cited is to govern. If a billiard-table were fastened to the floor so as to be conceded a fixture, would not the balls and cues pass also? A bucket in a well may be detached, and it is movable, running from top to bottom of the well, yet it is a fixture by common consent. A shuttle in a loom is thrown from place to place by the motive power of the machinery, yet it is an essential part of the machine. It is not inconceivable that rails and cars might be so constructed as that the car should be held upon the rail by certain material contrivances, and yet be propelled from one station to another, from one end of the road to another, by steam-power. In such a case, none would doubt that the cars were a fixture. Can it be said that the manner of accommodating and adjusting the cars to the rails can make any difference?

"The railroad, like a complicated machine, consists of a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on and abstract some essential part from Woodworth's planing machine, or any other combination of machinery, as to take from a railroad its locomotive and passenger cars. Such an obstruction would cause the operations to cease in both cases." (McLean, J., in Coe *vs.* Pennock *et als.*) Again, to follow the principle of Snedeker *vs.* Warring, it may well be said that the *destination of the rolling stock, the intention of the company,* have a controlling influence in determining whether it is real or personal property, "and its connection with the land is looked at principally for the purpose of ascertaining whether or not it was the intention of the company that the rolling stock should preserve its chattel character, or become a permanent accession to the land."

These considerations are as conclusive in regard to the furniture of the road as they were in regard to the statute. *And even more so.* The statute might have been sold by the sculptor for the adorning of *any residence,* though, in fact, it was made for the particular use. Here, the rolling stock was not only designed by the company to be used *only* on the railroad, but this company had no legal right to buy or own the stock for any other purpose. The right to buy and own rolling stock is a franchise, and can only be exercised as an accessory to the operation of the railroad. Any buying or selling of cars, engines, &c., by the company, for the mere purpose of speculation, would be unauthorized and illegal. Here, then, is a consideration showing conclusively that the company intended the rolling stock to be used only for the road, or, in other words, to become *a permanent accession* to the real estate of the company. The intention of the owner, the use for which the property was designed, the connection between the road and the cars, and the essential relation between them, for the purpose of revenue, all combine to declare the rolling stock real estate.

In Pierce *vs.* Emery, 32 N. H., 484, the Portsmouth and Concord Railroad Company had mortgaged all their property, real and personal, *and all their franchises.* The court held that the rolling stock acquired subsequent to the execution of the mortgage belonged to the mortgagee. The court say: "The object of the act being to give the bondholders a substantial and available security for their money, and a preference over other creditors not previously secured, can only be answered by so construing the law" (authorizing the mortgage) "as to give the bond-holders security upon the road itself, *as the general subject-matter of the mortgage, and upon the changing and shifting property of the road as part and parcel, by accession, of the thing mortgaged.*"

In Phillips *vs.* Winslow, in Kentucky, it was held that, in equity, the rolling-stock acquired subsequent to the execution of the mortgage passed as an accession or fixture.

See also Pennock *vs.* Coe, 23 How., 117.

In Redfield on Railways, p. 576, note, it is said that rolling-stock is an *accessory,* though not a *fixture.* In the strict technical sense of the word, as used in the old cases, rolling-stock is not a *fixture;* but we submit that, within the reason and philosophy of the modern cases, it is so; or that, if it must be called

not a fixture, in deference to the old cases, it is yet an *accessory*, and as much a part of the road as a fixture would be. When the court, therefore, in the land grant cause, determined how much of this rolling-stock was covered by the land grant mortgage, and that the remainder of it was covered by the Eastern Division mortgage, it did thereby settle the fact that all the rolling-stock which was included in the Eastern Division mortgage—that is, all except the forty box-cars—was a part of that division; and, of course, the land grant mortgage (which does not pretend to touch the Eastern Division, or whatever belongs to it, as an accessory or fixture) does not include it.

Thus it is seen that the legal effect of the order of the court upon the master's report, and the decree in the land grant cause, is to exclude all claim under that mortgage to any but the forty box-cars, *even if it had been intended otherwise*, which we have shown was not the case.

2. It would be improper here to inquire how the masters ascertained the fact, or, in other words, whether the testimony before them was sufficient to sustain their finding. The exceptions to the reports were overruled; the decree was based upon them; and it matters not how erroneous they may have been, or how insufficient the testimony may have been to sustain them, or whether the testimony directly contradicts the findings of the report and the decree, because the trustees *executed that decree and did not appeal from it.* The rights which the St. Paul Company have, are precisely those which the decree, qualified by the previous order, gave, *whether that decree was right or wrong.*

IV.—DIVERSION OF TRAVEL.

The Rev. Stats. of Wisconsin, page 510, in force when the land grant mortgage was executed, provide:

SECTION 33. * * * * And in case of any sale of any railroad or railroads, or any part thereof, constructed, or in process of construction, by any railroad company, on or by virtue of any trust deed, or on any foreclosure of any mortgage, thereupon the party or parties acquiring title under any such sale, and their associates, successors, assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities, and advantages, in and by said mortgage or trust deed enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debt, *so far* as the same relate and appertain to that portion of said road, or the line thereof, mentioned and described in and conveyed by said mortgage or trust deed, *and no further*, as fully and absolutely in all respects as the corporators, shareholders, officers, and agents of such company might or could have done therefor, had not such sale or purchase taken place; such purchaser or purchasers, their associates, successors, or assignors, [*assignees,*] may proceed to organize anew, and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such variations in manner and form of organization as their altered circumstances and better convenience may seem to require; *provided, however*, that no greater or enlarged powers shall be exercised by the new organization than are conferred by the charter of such company.

The land grant mortgage conveyed the Western Division, "and also all and singular the rights, liberties, privileges, and franchises of said railroad company, of every kind and description, *relating to said road*"—that is, relating to said *Western Division*. The purchaser acquires just what was mortgaged, the Western Division, and the right to use, operate, and enjoy in the same way that it could have been used, operated, and enjoyed by the company, had the mortgage not been given. The company was incorporated to build, and did build and put in operation, a continuous line of railway, connecting the Mississippi river with the State of Michigan; and every man who subscribed and paid for stock, did so upon the assurance of the Legislature that the road was to be one,

and to be operated as one great link in the communication between the Eastern and Western States. And every holder of a bond secured by a mortgage on any part of this road, holds his security on a part of a *through route*, and not on fifty miles, as a distinct road. I take it to be clear that, had the La Crosse and Milwaukee Railroad Company, after completing its road, proposed to divert the Western from the Eastern Division, and make it auxiliary to some other road, thereby rendering the Eastern Division far less valuable, and violating the public policy of the State by dividing into two roads what the Legislature had provided should be one, that any stockholder or mortgage bondholder of the company could have filed his bill in equity to enjoin the company against thus departing from the fundamental objects of its charter. Such suits have been frequently sustained. (Bagshaw *vs.* Eastern M. E. R. R., 7 Hare, 114; Kean *vs.* Johnson, 1 Stock, ch. 401; Redfield on Railways, 495 and notes; The Great North. R. R. *vs.* East. R. R. Co., 41 Eng., ch. 304.)

If the company could not make such separation of its road, it could not convey to one or more persons, or classes of persons, the right to do so. The rights, privileges, and franchises of the company "*relating to said road*," from Portage to La Crosse, authorized the company to operate it *in connection with the Eastern Division*, as a part of one continuous road, *and in no other way*. This right it has mortgaged, and the purchaser at the sale acquired it, but does not acquire any other or different rights concerning it, or authority or dominion over it, than the railroad company had. Therefore, the scheme of these purchasers to take possession of the Western Division, separating its interests entirely from the Eastern Division, to unite its destinies with what is called the Milwaukee and Western Railroad Company, can be arrested by the Milwaukee and Minnesota Railroad Company, or any other person interested, by this bill.

Upon this ground alone the injunction prayed should be granted. The bill shows that the Milwaukee and St. Paul Railway Company is diverting the use of this rolling stock to another road; and thus using the Western Division in opposition to the interests of the Eastern Division, even if it were conceded that the land grant mortgage did cover all the rolling stock that belonged to the Eastern Division.

V.—RIGHT OF THROUGH TRAINS.

2. The Legislature of Wisconsin incorporated the La Crosse and Milwaukee Railroad Company, and granted to it very liberal rights, powers, and franchises, to build, equip, and operate a railroad from the village of La Crosse to the city of Milwaukee. The charter recognizes no division of the road into sections, no distinctions as to the stock of the company. The company, the stock, and franchises are entire and indivisible, so far as the provisions of the charter are concerned. The first ninety-five miles of the road, from Milwaukee to Portage, is commonly called the Eastern Division, and the last one hundred and five miles, from Portage to La Crosse, the Western Division. But these designations are not found in the charter, any law amendatory thereof, nor in the mortgages themselves, and are only employed for convenience, to distinguish the subject-matter of the several fractional mortgages given by the old company.

Those mortgages, so far as concern the present questions, (there were others, immaterial here,) were as follows:

(*a*) The mortgage to Palmer, conveying ninety-five miles of the road, from Milwaukee to Portage, together with "all its (said company's) property, real and personal, pertaining to said railroad *within said limits*, and all its rights, credits, and franchises *thereto* appertaining."

(*b*) The land grant mortgage conveyed that part of the road from Portage to La Crosse, one hundred and five miles, together with all the rolling stock *appertaining thereto*, "and, also, all and singular the rights, liberties, privileges, and franchises of said railroad company, of every kind and description, relating to said" road, so mortgaged.

(*c*) A third mortgage to Barnes, conveying the entire line of road from Milwaukee to La Crosse, together with all the property of said company, real and personal mixed, *and all the liberties, privileges, rights, and franchises of said company, of every kind and description, subject to all prior legal liens thereon.*

The mortgage to Barnes was foreclosed in May, 1859, and the purchasers organized the Milwaukee and Minnesota Railroad Company, under the laws of the State of Wisconsin, and thereupon said last named company became seized in fee of *all the property, road, rolling stock, and franchises* of the old company, subject to all previous legal leins; indeed, became the successor of the old company, as to *all its rights, franchises, and property.*

See Soutter *vs.* R R. Co., 2 Wallace, Sup. C. U. S., 404.

Subsequently a foreclosure, in form, of the mortgage on the Western Division was had, and resulted in the organization of the Milwaukee and St. Paul Railway Company, which claims to have become the owner of the premises conveyed by that mortgage, including the road from Portage to La Crosse, *together with the liberties, privileges, and franchises of the old company* RELATING THERETO. Assuming the foreclosure of this Western Division mortgage to sale and confirmation inclusive, to be regular, the question is, *what right has the Milwaukee and St. Paul Railway Company acquired thereby as against the Milwaukee and Minnesota* Railroad Company? Can the St. Paul Company use the Western Division to feed a road rival to the Eastern Division? or, *must the Western be used in connection with the Eastern Division, so as to preserve a through route from Milwaukee to La Crosse according to the charter of the old company under which both these new companies claim and hold their respective rights and franchises?*

3. To determine this, we must consider the public policy of the State as manifested by the charter and the statutes under which this Western Division mortgage was given and foreclosed; and first inquire what were the rights of the old company in relation to the Western Division of this road, after the entire line was completed from Milwaukee to La Crosse.

(*a*) The charter was a contract between the State and the corporation, binding upon both parties, (subject only to the right in the Legislature, reserved by our Constitution, to alter, modify or repeal the same.) This is a familiar and well-settled principle of constitutional law, and therefore authorities need not be cited to sustain it.

This contract—the charter—imposed upon the company the obligation of *constructing, equipping,* and *operating* a through route from Milwaukee to La Crosse, and it was not in the power of the company in any manner, or by any shift or device whatever, to release itself from that obligation.

The Legislature had authorized a road to be constructed and operated between these designated termini, Milwaukee and La Crosse, and the company could not, under its charter, build a road from Milwaukee to Portage only, nor from Portage to La Crosse only. And had the company completed a part of its road and claimed to operate it, the courts would have granted a peremptory mandamus compelling the company to complete its road to the point designated—La Crosse.

In The Queen *vs.* Eastern Counties Railway Co., (10 A. and Ellis, 531) the charter of the company was to build a railway from London to Norwich and Yarmouth; the company completed its road to Colchester only, and abandoned the rest. A writ of mandamus was granted compelling the company to complete the road to the termini fixed in the charter, *although the company stated that they had not, and could not raise, without a new act of Parliament, funds sufficient for that purpose.*

Lord Denman, C. J.: "The principles upon which these powers are conferred by the legislature upon undertakings of this description are now so fully understood that it is not needful to do more than generally to refer to them. They are thus laid down by Lord Elden in the well-known case of Blackmore *vs.* The Glamorganshire Canal Co., 1 Mylne and Keene 162. 'I apprehend those who

came for these acts to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else: that they shall do and forbear all that they are thereby required to do, and forbear as well with reference to the interest of the public, as with reference to the interests of individuals."

And, alluding to the title of the act, which was "for making a railway from London to Norwich and Yarmouth," Lord Denman says:

"Now the objects and purposes for which this company has been incorporated and empowered, or, in the words of the passage cited, what the legislature has empowered *and compelled* them to do *and to submit to*, are too clear to admit of any doubt. * * * *

"We consider it to be equally undeniable that to carry the railroad through a portion only of the described line, such as a third or a half, is a nominal, and not a real, compliance with the meaning of the act of Parliament."

(*b*) The duty to operate the road—and to operate it as an entire road—is as clear as that of completing it, and would have been enforced against the old company by the same process. Any attempt on its part, therefore, after the completion of the entire line, to employ one part in opposition to another, or to divert business from a part to a rival or competing line, or otherwise depart from the leading features of the original enterprise, would have been enjoined at the complaint of any stockholder of the company, or other person or party injured, and such suits have frequently been sustained.

Kean *vs.* Johnson, 1 Stock., 401.
Bagshaw *vs.* G. N. Co., 7 Hare, 114.
The G. N. Ry. Co. *vs.* E. Co., 9 Hare, 306.
Works *vs.* Junction R. R., 5 McLean, 425.

Redfield on Railways, 495. "It is a settled rule of equity law that the minority of the shareholders in a joint stock corporation may maintain a suit to restrain the directors of the company, or the majority of the shareholders, from entering into a stipulation whereby the business of the company is changed *and directed into channels and enterprises* wholly diverse from those originally contemplated and entered upon, and from which their emoluments had been derived."

It being clear that the old company could not directly abandon any part of its line, or use one part of it to destroy another part, and thus evade the duty imposed by its charter, it follows that the same result could not be accomplished indirectly by mortgaging and suffering sale of a part of the road, without legislative sanction. This brings us to a consideration of the laws of Wisconsin, to ascertain whether such permission has been granted; and if given, whether, and to what extent it has been exercised by the company.

(*c*) By chapter 78, Private Laws of Wisconsin, 1856, the company was empowered to make a mortgage upon "the whole or any part of its railroad constructed, or authorized to be constructed, or of any or all of their estate, real, personal, or mixed, in possession or expectancy;" and was also empowered, "in and by said mortgage or deed of trust, to confer upon the trustee or mortgagee full and ample powers to enter into and upon, and to take possession of, have, use, and employ, or to sell and dispose of the whole or any part of said railroad or estate, *together with the functions appertaining to said railroad*, AND ALL CORPORATE AND OTHER FRANCHISES, RIGHTS, AND PRIVILEGES OF SAID LA CROSSE AND MILWAUKEE RAILROAD COMPANY."

By this act the company was authorized to mortgage (1) its railroad or other property; (2) the functions of the company appertaining to the road or property mortgaged; (3) ALL CORPORATE AND OTHER FRANCHISES OF THE COMPANY. The indivisibility of the general franchises of the company is clearly recognized by this statute. The company were authorized to mortgage a part of its road,

the functions of the company pertaining thereto, *and also all the corporate and other franchises of the company*. So that the purchaser of a *part* of the *railroad* might acquire *the whole franchises*. "Franchises cannot be divided, if they are entire franchises, as to have good of felons, outlaws, &c., or wafts and strays, &c., and therefore, if they descend to two *coparceners*, no partition can be made of them." (Viner's Abridgement, 507.)

In Donnelly *vs.* Vanderburg, 3 J., 27. By an act of the Legislature a grant was made to A and six others named, of the exclusive right of establishing and running stage wagons on the west side of Hudson river, from Albany to the north line of New Jersey. Thompson, J., delivering the opinion of the court, said:

"I should much doubt whether the privilege or franchise granted by this act is, according to the spirit and intention of the act, susceptible of partition, so as to give exclusive and independent rights in distinct parcels of the road. Public accommodation and convenience were the objects the Legislature had in view, and a common interest to each proprietor in the whole extent of the road would seem necessary, to prevent confusion with respect to the continuation of the line of stages. If the franchise may be so divided as to vest separate rights, in distinct parts, what would be the consequence of a neglect by any one to perform the duties enjoined by the act? Would this portion of the road only be forfeited, or the whole extent? I apprehend the latter, and this would subject the other individuals to a forfeiture without a default."

All the legislation in relation to this corporation, and all the mortgages given by the company, recognize this principle, and proceed upon the basis of the indivisibility of the general franchises of the old company.

(*d*) Let us turn now to the mortgage, and see to what extent the power given to this company to mortgage was exercised. The description of the property conveyed is as follows:

"Now, therefore, this deed witnesseth, That the said railroad company, in consideration of the premises, and of the sum of one dollar paid by said parties of the second part, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said parties of the second part all and singular the several tracts, pieces, or parcels of land which now are or may hereafter be or constitute the site of the roadway, turnouts, engine houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute or may hereafter constitute or be a part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said roads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all other improvements on or pertaining to said roads, whether now built and made or to be built and made hereafter. And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said roads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of said railroad company of every kind and description RELATING TO SAID ROADS."

Nothing else material to this question was conveyed by this mortgage. There is (1) the road from Madison to Portage, and the road from Portage City to La Crosse; (2) all the rolling-stock and other property belonging to said roads; (3) and also all the franchises of said company relating to said roads, that is, the roads mortgaged.

As it is certain that nothing can pass by a mortgage except what is described

in it, and as the only franchises of the old company which this mortgage pretends to convey are the franchises *relating to the sections of road conveyed*, it follows that, if any franchise of the old company is claimed to be included in the mortgage, it must be shown affirmatively that it is a franchise *that related to those particular sections.*

Franchises are a species of incorporeal hereditaments. Franchises and liberties are used as synonymous terms, and their definition is, "A royal privilege or branch of the king's prerogative subsisting in the hands of a subject."

Blackstone defines incorporeal hereditaments, and gives ten sorts, including advowsons, franchises, commons, etc. Advowson is appendant, or *in gross*, or *at large*. When it is annexed to the possession of the manor, it is appendant, "and will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without any other words. But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson *in gross, or at large*, and never can be appendant any more, but is, for the future, annexed to the person of its owner, and not to his manor or lands." (2 Black. Com., 21.)

"So common is appendant or in gross, as it is annexed to land or to a man's person. Common in gross, or at large, is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor." (2. Black. Com., 43.)

The incorporeal hereditament of ways may also be vested as an inheritance in A and his heirs; or it may be annexed to certain lands and pass as an appurtenance. (2. Black. Com., 43.)

So with franchises; they may be annexed to land or to the person of the owner; in other words, they may be appendant, that is, belonging or relating to land, or they may reside in the owner, disconnected from any material objects, and are then *in gross*, or at large.

It is a franchise to be a corporation, and, when the corporation has come into existence, other franchises may be conferred upon it, and these may be appendant or at large; may be annexed to some tangible material object, or may be held at large by the corporation.

The franchises to sue and to be sued, to have a common seal, to hold and convey property, to run trains from Milwaukee to La Crosse, and many others, were possessed by the old company at large, and not as appendant or relating to any particular section of the road. The franchise to hold the land by right of eminent domain, upon which a particular section of the road is constructed, the franchise to take material from adjoining lands to repair the road, and perhaps others, MAY *be said to relate to that section*, and, if so, would pass with it as appurtenances, if the company were authorized to convey the same. These local franchises, annexed to the particular section of the road conveyed, *if any such there are*, are described in and passed under the mortgage, and no other. If there are no franchises that can be deemed appendant to this section, *then none passed to the St. Paul Company.*

It is manifest that the right to run trains from Milwaukee to La Crosse, which was an undoubted franchise of the old company, did not pertain to any particular section or part of the road. If it can be said to have pertained to the road at all, it was to the whole road, and not to a part. And the old company remained, after giving the Western Division mortgage, the owner of every right and franchise not included in the description of this mortgage, or, in other words, not pertaining to that section of the road.

The Legislature had authorized the company to mortgage any part of its road, and give the mortgagee right to enter and control the property, the functions pertaining thereto, and all the corporate and other franchises of the company. But this power was not exercised in this mortgage, except as to the Western Division and *appendant* franchises. The "corporate and other franchises," *at large*, in the company were not conveyed, but remained in the company until they were conveyed by the Barnes mortgage. Nothing can be clearer than that the Legislature intended a distinction like that we have stated between the fran-

chise *appendant* and *at large*. They authorize the disposition of the road, "together with the functions appertaining to said railroad;" then the act specifies, as a distinct subject-matter, "and all corporate and other franchises, rights, and privileges" of the company. The company, in giving the mortgage, exercised a part only of this power, granted a section of its road only, and the franchises of the company "relating thereto," but did not also grant "the corporate and other franchises of the company," which it possessed in gross, and not as appendant to the particular section conveyed.

After the mortgage of the Western Division, the old company, in 1858, made its mortgage to Barnes, conveying all its railroads and property, real, personal, and mixed, choses in action, and franchises, by express words, as follows:

"*Now, therefore*, this indenture witnesseth, That the said La Crosse and Milwaukee Railroad Company, in consideration of the premises, and of the mutual promises therein contained, and the sum of one dollar, paid by the said party of the second part to said party of the first part, the receipt of which is hereby confessed and acknowledged, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm unto said party of the second part, all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles, and also the railroad of said company, commencing in the village of Madison, and running from thence, by way of Portage City, to the St. Croix river, or lake, a distance of about two hundred and sixty-eight (268) miles; and also the railroad of said company, commencing in the village of Columbus, and running from thence to Portage City, a distance of about forty (40) miles, a part of which roads have been constructed and are now in full operation, and the residue are in process of construction; and all other railroads built or to be built and constructed by said company, or which they have a right to construct, by or under any corporate or other rights, privileges, or franchises heretofore granted or given, or which may be hereafter granted or given to said La Crosse and Milwaukee Railroad Company, by the Legislature of the State of Wisconsin, or from any other source, or in any other manner whatsoever, including all and singular the several tracts, pieces, or parcels of land which now are, or hereafter may be, or constitute the site of the road-ways, turn-outs, engine-houses, work-shops, depots, and other buildings, and all other lands and real estate which now constitute, or may hereafter constitute, or be a part of, or appertain to, said railroads; and including also all and singular the lots, lands, and real estate whatsoever which the said railroad company now own, or which they shall hereafter acquire by purchase, grant, gift, or otherwise, in the cities of Milwaukee and La Crosse, or in the vicinity of either of said cities; and all improvements made or to be made thereon, and all rights of dockage and wharfage, and all other riparian rights, privileges, and franchises appertaining thereto, for a particular description of which lands, already acquired, reference is made to the various deeds of the same to the said company.

"And also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, work-shops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, whether now built or made, or to be built or made hereafter.

"And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been, or may hereafter be, procured for or used on said railroad, and all the materials, tools, implements, and utensils, and other personal property which have been, or may hereafter be, procured for or used in connection with said railroads.

"AND ALSO ALL AND SINGULAR THE RIGHTS, PRIVILEGES, LIBERTIES, AND FRANCHISES OF SAID LA CROSSE AND MILWAUKEE RAILROAD COMPANY, OF EVERY KIND AND DESCRIPTION.

"And also the said La Crosse and Milwaukee Railroad Company has granted,

bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm unto said party of the second part, all and singular the lands granted, or intended to be granted, to said railroad company under or by virtue of the act of Congress and the act of the Legislature of the State of Wisconsin, hereinbefore mentioned, together with all and singular the hereditaments and appurtenances belonging or in any wise appertaining to the lands and real estate hereby conveyed or intended to be conveyed.

"And also all and singular the stock, railroad, or other bonds, bills of exchange, promissory notes, accounts, causes of action, demands, and choses in action, of whatsoever nature, which may be owned, or in which the said railroad company may have an interest on such day as the said railroad company may first make default in the payment of the interest or principal, or any part thereof which may hereafter become due on any of the said bonds issued, or to be issued, by said company.

"And it is hereby declared to be the intention of the parties to these presents, to convey to and vest in said party of the second part all the property, real and personal and mixed, of said railroad company, to be acquired or vested hereafter, as well as that which has been already acquired or vested, together with all the rights, liberties, privileges, and franchises of said railroad company, as fully and amply as the same might be conveyed if said railroads had already been fully built, constructed, and equipped, and the particular lands granted by the foregoing acts of Congress and the said Legislature had already been fully designated and duly patented to said railroad company according to the provisions of said acts."

This mortgage, which for the first time conveyed the general franchises of the old company, was foreclosed in 1859, and the entire subject-matter of the mortgage became vested in the Milwaukee and Minnesota Company, which has become the successor of the old company as to all its property and franchises; and the rights of the St. Paul Company as against the Minnesota Company are the same as they would have been against the old company. Just what was conveyed by the Western Division mortgage, of property and franchises, that company now owns, nothing more.

Soutter *vs.* R. R Co., 2 Wallace, 304.

(*e*) It will be seen, by examination, that the language of the Western Division mortgage is substantially the same as to rolling stock and franchises, viz: "All and singular the locomotives, engines, and other rolling stock, * * * which have already been, or may hereafter be, procured for, or used on, said roads or either of them;" and as to franchises, "all and singular the rights, liberties, and franchises of said railroad company, of every kind and description, *relating to said roads.*"

The St. Paul Company claimed that it had acquired, as against the Minnesota Company, all the rolling stock on the whole road; that its mortgage was to be considered as an incumbrance second to the Palmer mortgage, on all the rolling stock. The Minnesota Company brought its bill to have its rights declared as to the rolling stock, and the case is reported 2 Wallace, Supreme Court U. S., 609.

The court says, p. 635: "The language in the descriptive part of the Palmer mortgage, and that in the corresponding part of the mortgage on the Western Division, when considered in reference to the rolling stock alone, may not be free from doubt as to its construction. But when we consider it in reference to the clear purpose of the parties to make the mortgages, distinct, and different as to everything else conveyed by them, *we conclude that it was intended that the rolling stock covered by each mortgage was that which was properly appurtenant to each particular division of the road.*"

This decision settles the construction of the mortgage as to rolling stock, and is equally conclusive as to franchises conveyed, the language descriptive being substantially the same. As to franchises, as well as rolling stock, the mortgage conveyed nothing except what was *appurtenant to that division.*

4. The Revised Statutes of Wisconsin, page 510, in force when the land grant mortgage was executed, provide:

"Section 33. * * * * And in case of any sale of any railroad or any railroads, or any part thereof, constructed, or in process of construction, by any railroad company, on or by virtue of any trust deed, or on any foreclosure of any mortgage, thereupon *the parties acquiring title under any such sale*, and their associates, successors, assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, *all and the same rights, privileges, grants, franchises*, immunities, and advantages in and by said mortgage or trust deed enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debt, *so far as the same relate and appertain to that portion of said road*, or the line thereof, *mentioned and described in, and conveyed by, said mortgage or trust deed, and no further*, as fully and absolutely in all respects as the corporators, share-holders, officers, and agents of such company might or could have done therefor had not such sale or purchase taken place; such purchase or purchasers, their associates, successors, or assignors, (assignees,) may proceed to organize anew, and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally *under and in the manner provided in the charter of such railroad company*, with such variations in manner and form of organization as their altered circumstances, and better convenience may seem to require; *provided, however, that no greater or enlarged powers shall be exercised by the new organization than are conferred by the charter of such company.*"

This provision enters into and forms a part of the mortgage, and declares the rights of the St. Paul Company, as purchaser at the foreclosure sale. The rights of the old company acquired by the purchaser are those that relate and appertain *to that portion* of said road described in the mortgage, *and no other*. All other franchises remained with the *parent company* after such purchase; and in this case are now held by the Minnesota Company. To determine, therefore, whether the St. Paul Company now has the right to do a certain thing, we have only to inquire whether the old company could have done the same thing. And if we are correct in saying that the old company could not, after the construction of its entire line, have employed one-half of the road to destroy the other half, could not have used the Western Division to feed a line of road in competition with the Eastern, it follows that the St. Paul Company has no better right.

Suppose the old company had, after completing the road, mortgaged ten miles of it for one hundred thousand dollars, could it thereafter have built ten miles of road parallel with the section mortgaged, connecting at each end with the main line, or consolidated with such parallel road, and thus have rendered the ten miles mortgaged worthless? Under such circumstances, can there be a doubt of the mortgagee's right to enjoin such act? The holders of bonds secured by the Palmer mortgage on the Eastern Division hold their security, not on a railroad from Milwaukee to Portage, for there is no such railroad in the State, but upon ninety-five miles of *the road* from Milwaukee to La Crosse; and any bondholder secured by that mortgage might enjoin an attempt of the old company to render the Eastern Division worthless by diverting trade from the main line to the injury of that division; and, if so, may enjoin the same act when attempted by the St. Paul Company, which has in this behalf the same right the old company had, and no other.

After the purchase of the Western Division by the St. Paul Company an order was made by the district court in which the decree was rendered, confining the sale and giving that company possession of the Western Division and the rolling stock pertaining thereto. Subsequently, on 12 June, 1863, the same court made an order giving that company temporary possession of the Eastern Division. This was done, as I understand the district judge to say, to preserve the unity of the franchise, *and to secure the object of the original charter*, viz, *a through route from lake to river*. In a published opinion upon this subject the district judge, Hon. Andrew G. Miller, says:

"The only legitimate question before the court in June last, when the order modifying the action of the receiver was made, and now is, how is the road to be operated during the pendency of the appeal, *as an entire road under the grant of the charter*, to the best interests of the parties, the creditors and the public? *It was conceded* that the use of the road could *not be obstructed at Portage City*, BUT THAT THE CARS MUST BE RUN THROUGH THE WHOLE LENGTH OF THE ROAD * * * This order was intended to prevent a division of the travel and business on the Western Division from the Eastern, and to save the expense to two sets of employees, and to prevent interruption of the public."

5. But let us consider more in detail the relations of the Minnesota and the St. Paul Companies, in regard to the Western Division, the title to which, for the present, we concede to be in the St. Paul Company.

The charter was, as we have seen, a contract between the State as one party, and the corporation as the other party, by which the corporation was bound to operate a through line of road between Milwaukee and La Crosse. By permission of the Legislature, and as a means of executing the design of the State to secure such through line for the public benefit, the corporation was permitted to, and did mortgage and sell, a portion of its line, together with the functions and franchises of the company *relating thereto*, which have come to be owned by the St. Paul Company; and subsequently the old company mortgaged to Barnes the residue of its road and property, *and for the first time conveyed all its general franchises*, which have come to be owned by the Minnesota Company. What of property and franchises the old company owned is now owned by two companies, both claiming under the old charter, and each having just what its mortgage gave; and, without regard to their rights as against each other, it is manifest that the two companies, in the aggregate, hold precisely what was held by the old company; and as between the State and the two companies, the obligations of the charter remain unchanged, and rest with paramount force upon both companies; and the State has the right to require of the owners of this entire road and its franchises just what it could have required of the old company, viz, the operation of a through line from lake to river; and the right of each owner is burdened with the obligations and duties inseparable from this *paramount franchise*, which is to be exercised for the public benefit.

The revised statutes, before quoted, are conclusive upon this subject. The company may make any number of mortgages like the one we are considering upon different sections of its road, and when one or more are foreclosed, the several purchasers acquire the fee of the particular section, and just such franchises of the old company as pertained to that section; and the old corporation, with such of its property and franchises as remain to it, and the purchasers, with such property and franchises at they have severally acquired, in the aggregate, represent the old company in its contract obligations to the State, and each must so use and operate his own as not to prevent the other, or all combined, from fulfilling the duties which the State may require from all.

I concede the St. Paul Company to be the owner of the Western Division, its rolling stock and appendant franchises, in severalty; *but the franchises at large of the old company, one of which is the right to run trains from Milwaukee to La Crosse, are vested in the Minnesota Company alone*, and the duty rests upon that company to exercise this franchise and secure to the public the benefit guaranteed by the charter.

The rights and equities of the companies *inter se* will be protected by requiring the Minnesota Company to pay a reasonable toll for running over the Western Division; but as between the State and the Minnesota Company, the parent company, the owner of the franchises *in gross*, the State has a right to demand, and it a right to perform, the duty imposed by the charter. The St. Paul Company holds only a part of what belonged to the parent company, and its rights as owner of such part are as perfectly subordinate to the duty of the parent company as was the right of a stockholder in that company, and can no more

be interposed to prevent the parent company from performing its duty to the State; and any attempt of the St Paul Company to use its section of the road so as to prevent through trains by the Minnesota Company is a wrong which can be restrained in the courts of the State. It may be that, as the owner in severalty of a section of the road and rolling stock pertaining thereto, the St. Paul Company has a right to run local trains upon its section for its exclusive benefit; but if so, this right must be so exercised as not to impede the higher right of the parent company to perform its duty to the State and the public. The through trains must take precedence, and the exclusive local rights of the St. Paul Company must be exercised in strict subordination thereto.

6. These arguments concede the validity of a *fractional mortgage* upon a part of a railroad, because the right of the Minnesota Company to run through trains is in no way impaired by giving to the mortgage under which the St. Paul Company holds full effect, according to its terms, and therefore the discussion of this subject becomes unnecessary. The validity of such a mortgage for any purpose is questioned by many able jurists, and has never been settled in favor of such a mortgage, where the question was directly presented, to my knowledge. The St. Paul Company is believed to be a pioneer in the experiment of acquiring and holding a part, by metes and bounds, of an indivisible thing.

It is asserted that the Legislature has given its consent to a severance of the road and franchises, and therefore the St Paul Company "has now the right to operate its portion of the La Crosse road as independently as if it had built the same under a separate charter," &c.

The reply to this is two-fold:

(1.) The Legislature never gave any such consent.

(2.) Conceding that the Legislature granted this permission, it was never exercised by the old company.

(1) By chapter 78, Private Laws of Wisconsin, 1856, the company was empowered to make a mortgage upon "the whole *or any part* of its railroad constructed, or authorized to be constructed, or of any or all of their estate, real, personal or mixed, in possession or expectancy;" and was also empowered. "in and by said mortgage or deed of trust, to confer upon the trustee or mortgagee full and ample powers to enter into and upon, and to take possession of, have, use, and employ, or to sell and dispose of the whole or any part of said railroad or estate, *together with the functions appertaining to said railroad;* and all corporate and other franchises, rights and privileges of said La Crosse and Milwaukee Railroad Company."

By this act the company was authorized to mortgage (1) its railroad, or other property; (2) the functions of the company appertaining to the road, of property mortgaged; (3) all corporate and other franchises of the company. The indivisibility of the general franchises of the company is clearly recognized by this statute. The company were authorized to mortgage a part of its road, the functions of the company pertaining thereto, *and also the corporate and other franchises of the company.* So that the purchaser of a *part* of the *railroad* might acquire *the whole franchises.*

Now the mortgage that was given on the Western Division, under which the St. Paul Company claims, did not convey the general franchises. It conveyed certain sections or portions of railroad, together with all the rolling stock *belonging thereto,* and all the franchises *relating thereto.* It is of no consequence to inquire what *power* the company had to mortgage their franchises, unless it can also be shown that they *exercised* that power, which in this case they clearly did not.

Under this statute, the company might have mortgaged one mile of its road and all the franchises of the company. This would have vested in the purchaser his mile of the road, and the franchises which would have been, in the nature

of a servitude or easement, upon the whole road. The owner of the franchises could have operated the whole road, because *that* right *is* the franchise, and the owner of that right, by purchase under such a mortgage, could have exercised his right. Had the land-grant mortgage conveyed the Western Division, together with all corporate and other franchise of the company, then the St. Paul Company might have operated the whole road. The franchise was a right to run trains between La Crosse and Milwaukee, over this entire road; and whoever acquired that franchise has the right to run such trains. There is no evidence in any of the legislation on this subject that the Legislature intended to divide the franchise. Indeed, such a thing is impossible in the nature of things. A franchise to run trains from Milwaukee to La Crosse is totally different from a franchise to run trains from Milwaukee to Portage, and different from the franchise of running trains from Portage to La Crosse. It was undoubtedly within the power of the Legislature to have extinguished or recalled the first franchise, to run trains from La Crosse to Milwaukee, and to have created and granted another franchise to run trains from La Crosse to Portage. But where is the evidence that the Legislature intended any such thing? General assertions prove nothing; show us the chapter and section of any statute that looks to or contemplates any *annihilation* of the franchise granted to the old company.

But, it may be asked, what, then, did the Legislature intend when it authorized the company to mortgage a part of its road? The Legislature has answered this question in section 1, chapter 121, laws 1856, which provides that the purchaser of any part of a railroad under such a mortgage shall acquire such part of said road

And "the same rights, privileges, franchises, immunities, and advantages 'which belonged to and were enjoyed by the company making such mortgage,' *so far as they relate* and appertain *to that portion* of said road, or the line thereof mentioned and described in and conveyed by said mortage, *and no further.*"

This law was in force when the mortgage under which the St. Paul Company claims was given; and, therefore, forms a part of such mortgage.

By purchase under that mortgage, then, the St. Paul Company acquired the same right, with reference to the section of road purchased, that the old company had, and no other; that is, a right to use the same as the old company could have used the same. And how was that? Why, as a part of the entire through line of road from La Crosse to Milwaukee, *and in no other way.*

This is so plain a proposition, that I am at a loss how to make it plainer by argument.

Suppose the old company, after it had completed its road, had concluded, for certain reasons, to discontinue the use of the road from Portage to Milwaukee, and run off on some other road to Watertown, Chicago, or elsewhere. Does any man suppose this could have been done? Lest the next counsel for the St. Paul Company, who may enter into the arena, should claim such right in the old company, let me refer to a few authorities:

People *vs.* The Albany and Vermont R. R. Co., (24 New York, 267.)

The court say: "A company endowed with a franchise or privilege to maintain and operate a railroad on a fixed route and between places named in its charter, cannot exercise the franchise or privilege in the operation of a road upon *another route* and *between other places.* The franchise can only be legally exercised by the corporation, *operating its own* road. There is no privilege granted or right obtained to operate *a part thereof*, and if it should *undertake to do so*, it is exercising a franchise or privilege *without legal* sanction."

In the State *vs.* The Hartford R. R. Co., (29 Conn., 538,) the company, after building its entire road and operating it for years, constructed a new line, diverging from the old track, and run its passenger trains only on the new line, using the old track for freight only.

The court granted a mandamus, to compel the company to run passenger trains *throughout its whole road.*

The court say: "We hardly know what doubtful principles of law are thought to be involved in this case. The respondents certainly were bound to make their road (if at all) within the time prescribed in the charter; and having made it, to put it into use—every material part of it—and to keep it in use until discharged by the Legislature."

* * *Peremptory mandamus to be issued.*

To the same effect, see—

Queen *vs.* Eastern R. R., 10 A. & E., 531.
Keen *vs.* Johnson, 1 Stock., 401.
Bagshaw *vs.* G. N. Co., 7 Hare, 114.
The G. N. R'y Co. *vs.* E. Co., 9 Hare, 306.
Works *vs.* Junction R. R. Co., 5 McLean, 425.
Redfield on Railways, 495.

These authorities are conclusive upon this branch of the subject: conclusive to show that the old company could not, after the construction of the whole road, have broken the franchise at Portage or used the Western Division as a part of a through route; and the statute quoted provides, in so many words, that the purchaser, under a fractional mortgage, shall acquire a right to use the section purchased as the old company could have done. *and in no other way.*

This is the case upon the supposition that the St. Paul Company had acquired, with the Western Division, the whole franchises of the old company. But I have already shown that their mortgage did not convey the general franchise at all—that the Minnesota Company is the owner of the Eastern Division and all the general franchises.

Supreme Court of the United States.

DECEMBER TERM, 1867.

Milwaukee and St. Paul Railroad Company,
vs.
James T. Soutter,
AND THE
Milwaukee and Minnesota Company.
} Nos. 43 and 62.

Same Parties.—No. 161.

James T. Soutter and Shepherd Knapp,
vs.
Milwaukee and Minnesota Railroad.
} No. 218.

Milwaukee and Minnesota Railroad,
vs.
Milwaukee and St. Paul Railroad.
} No. 219.

BRIEF FOR PLAINTIFF.

SUPPLEMENT.

C. CUSHING.

WASHINGTON;
GIBSON BROTHERS, PRINTERS.
1868.

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vs.
Milwaukee and St. Paul Railroad.
} No. 219.

BRIEF FOR PLAINTIFF.

SUPPLEMENT.

C. CUSHING.

WASHINGTON;
GIBSON BROTHERS, PRINTERS.
1868.

Supreme Court of the United States.

No. 182. } December Term, 1866. No. 43. } December Term, 1867.
No. 212. } No. 62. }

THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY,
Appellants,
vs.
JAMES T. SOUTTER, Survivor Trustee,
AND THE MILWAUKEE AND MINNESOTA RAILROAD CO.

BRIEF FOR THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, Appellees.

This suit was commenced in the District Court for Wisconsin, December 9, 1859, by Greene C. Bronson and James T. Soutter, Trustees, to foreclose the second mortgage of the La Crosse and Milwaukee Railroad Company, on its Eastern Division.

Various appeals have been taken heretofore in this cause from time to time, upon which consecutive portions of the record have been brought up; and, therefore, the Clerk, in making his return on this appeal, sent up only such portions of the record as are subsequent to his previous returns.

Portions of the record previously returned are

No. 123, Dec. Term, 1863.
No. 267, Dec. Term, 1863.
No. 280, Dec. Term, 1864.

No 123 was an appeal by the complainants from the final decree, by which the bonds were sealed. That appeal was

heard December, 1863. (Reported, 2 Wallace, 283.) The Court reversed the decree and issued a mandate as follows: (*Record No.* 280, *p.* 9.)

It is therefore now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby reversed with costs, and that the said complainants, Greene C. Bronson and James T. Soutter, Trustees, &c., recover against the said respondents, the La Crosse and Milwaukee Railroad Company, *et. al.*, two hundred and sixty-one dollars and seventy-one cents for their costs herein expended, and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the Circuit Court of the United States for the District of Wisconsin, with directions to enter a decree for all the interest due and secured with the mortgage with costs.

That the Court ascertain the amount of moneys in the hands of the receiver *or receivers* from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same, and that if the moneys thus applied is not sufficient to discharge the interest due on the first day of March, 1864, then, to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the Court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises under the direction of the Court, and on bringing the proceeds into Court, they shall be applied to the payment of the balance of interest, and if they exceed such balance, shall be applied to the future accruing interest, down to the sale, and if they exceed that, to the principal of the bonds, in case the bond-holders assent, or *pro rata* to those who may assent, and any remaining balance of the proceeds to be invested under the direction of the Court, for the payment of future accruing interest, and ultimately the principal. And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as securing for subsequent accruing interest, and ultimately for the principal. And further, that the Court may pay out of the moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in these proceedings. And also, such council fees in behalf of the trustees as the Court, in its discretion, may seem right to allow.

No. 267 was an appeal by the Milwaukee and Minnesota Railroad Company from orders refusing the motion to discharge the receiver, and was dismissed as premature.

No. 280 was an appeal by the Minnesota Company.

1. From the decree entered on the mandate issued in No. 123.

On this branch of the appeal, this Court affirmed the decree.

2. From the order of Circuit Court denying the application to discharge the receiver, and to place the Minnesota Company in possession of road and appurtenances on payment of amount due.

The Supreme Court reversed this order, and directed an order to be entered granting the application made below.

These two appeals are reported, 2 Wallace, 511.

The mandate (*Trans. No.* 182, *p.* 15) is as follows:

"In consideration thereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court, in this cause, ascertaining the amount due to complainants, and fixing a time for the payment thereof, and for a sale on failure of payment, be and the same is hereby affirmed.

"And it is further ordered, adjudged, and decreed, that the order of the Court dismissing the application for the discharge of the receiver, and possession of the road and appurtenances be and the same is hereby reversed with costs; and that the said defendant, the Milwaukee and Minnesota Railroad Company recover against the said complainants $434.78 for its costs herein expended, and have execution therefor.

"And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court, with instruction to ascertain the amount due to complainants within some reasonable time to be fixed by said Court, *and to make an order that, on the payment of that sum, with the costs of complainants*, into Court within said time, the receiver shall be discharged, and the railroad from Milwaukee to Portage City, *with all the appurtenances, rolling stock, and other property, real and personal*, belonging to said division of road, be delivered by said receiver to the Milwaukee and Minnesota Railroad Company, but that no such discharge of the receiver or delivery of the road and its appurtenances shall be made until said Company shall first enter into bond with sufficient surety to pay to Sebre Howard and Selah Chamberlain, all such sums as may come into the hands of said Company,

which shall hereafter be found to be rightfully applicable to the payment of their claims, if they shall be established as liens on said road."

APPEAL IN No. 182.

This appeal (*Trans. No.* 182, *p.* 554) is by the Milwaukee and St. Paul Railroad Company.

1. From the report of auditor charging that Company with the use of rolling stock belonging to the Eastern Division, from June 13, 1863, to February 28, 1865, (No. 182, p. 78,).....$123,374.40

The use of same from September 1, 1864, to February 28, 1865, (No. 182, p. 536,)..... 86,466.54

$209,840.96

2. From the order and decree of the Circuit Court of the District of Wisconsin overruling the exceptions of the St. Paul Company to the auditor's report. (*Trans. No.* 182, *p.* 550.)

3. From the order and decree sustaining the 8th exception of the Minnesota Railroad Company to said report. (*Trans. No.* 182, *p.* 551.)

4. From the order and decree entered on the report and exceptions. (*Trans. No.* 182, *p.* 550.)

At the same time that the bill on this Eastern Division mortgage was filed, a bill to foreclose the land grant mortgage on the Western Division was filed by Bronson, Soutter and Knapp, Trustees. (*Trans. No.* 182, p. 234.) By stipulation (*Trans. No.* 182, p. 363) the whole record in the land grant cause was in evidence before the auditor. It is *Trans. No.* 159, *December Term*, 1866.

These two foreclosure suits proceeded *parti passu* with corresponding proceedings in each suit up to the final decree in this suit first appealed from; on the same day the final decree on the Western Division suit was entered.

In each of these suits references to the same masters were ordered to ascertain what portion of the rolling stock was appurtenant to each division of the road; and in each of

these suits it was determined by the report of the masters, and confirmation thereof, that of the whole rolling stock on the road at the time of the appointment of the Receiver in these suits only forty box cars were appurtenant to the Western Division and subject to the land grant mortgage; and that all the rest were appurtenant to the Eastern Division.

The decree in the land grant mortgage case covered only forty box cars of the rolling stock. (*Trans.* 182, p. 252.)

Under the decree of the land grant mortgage foreclosure on the Western Division, only forty box cars of the rolling stock above mentioned were sold to Pratt and White, who transferred their purchase to the St. Paul Company.

See petition of Soutter & Knapp, sworn to by Mr. Carey, stating this, (*Trans. No.* 182, p. 540;) Marshal's report of sale and order of confirmation, (*Trans. No.* 182, pp. 256, 259.)

The Milwaukee and St. Paul Company was organized May 5, 1863. *See Trans. No.* 182, p. 423, for answer of St. Paul Company to the supplemental bill in Western Division cause, which also states the foreclosure and sale under the land grant mortgage.

The order of reference to make this inquiry as to rolling stock in the Western Division suit, the masters' report thereon, with the exceptions and the order of the court confirming such report, by which it appears that only forty box cars are appurtenant to the Western Division, are to be found at pp. 244, 245, 251, *Trans. No.* 182.

Exactly corresponding orders and proceedings in the Eastern Division case making the same distinction of the rolling stock are to be found in previous returns of the record in this cause. (*Trans. No.* 132, *December Term*, 1863, pp. 297, 301, 585.)

Shortly after the commencement of the two foreclosure suits Hans Croker was appointed receiver in both suits. See order in land grant suit, *Trans.* p. 242; see order in Eastern Division suit, *Trans.* 132, p. 57.

For his own account of all orders appointing him, and

what was done from time to time with the rolling stock, see *Trans. No.* 182, p. 19.

The sale under the land grant foreclosure took place April 25, 1863, (*Trans. No.* 182, p. 257,) and was confirmed May 5, 1863, (*Trans. No.* 182, p. 259.) On the 7th of May, 1863, the St. Paul Company presented a petition to the District Court in both suits, praying possession of the entire line, both Eastern and Western Divisions, and all the appurtenances thereto, (*Trans. No.* 182, p. 259,) offering, if this was done, to account to the "Receiver of the net tolls and income of said Eastern Division, under the direction and supervision of this honorable Court, and to submit such rules and regulations in respect thereto as this honorable Court shall make and establish."

Upon the presentation of this petition the following three orders were made by the *District Court:*

On the 7th of May, 1863, in the Western Division suit the following order, (*Trans. No.* 182, p. 261:)

"Whereupon it is ordered by the Court (Mr. Carpenter, in behalf of the Milwaukee and Minnesota Railroad Company, and Mr. Ryan, in behalf of William Crawshay and Orville Oddie, objecting) that the receiver deliver over to the said Milwaukee and St. Paul Railway Company the said railroad and appurtenances between Portage City and La Crosse, *and the rolling stock and property specially described in the decree.*

"And it is further ordered by the Court, that a full and perfect inventory be taken by the receiver of all rolling stock *other than the forty box cars specially mentioned in the decree,* and of all personal property belonging to the said La Crosse and Milwaukee Railroad Company, *including such as have been procured by the receiver and now on hand,* and that he make report of the same on the eighth day of June next.

"And as in pursuance of the act incorporating the La Crosse and Milwaukee Railroad Company, a continuous road has been constructed and operated between La Crosse and Milwaukee, and the interest of the public requiring that the said road, as constructed and operated, shall continue to be so operated, it is ordered by the Court (reserving the right to rescind, change or modify this order at any time hereafter) that the said Milwaukee and St. Paul Railway Company and the receiver who continues to be the receiver of the Eastern end or division of said La Crosse and Milwaukee Railroad,

between Milwaukee and Portage City, jointly operate said road between La Crosse and Milwaukee without interruption, and that the said Milwaukee and St. Paul Railway Company, and the said receiver, jointly employ all the agents and persons necessary for the proper operating of said road; that the revenues of said road be paid to the receiver as heretofore, who shall keep all accounts and books for the inspection of the said Company, and said Company make, keep, and duplicate books, and that all payments and disbursements for necessary expenses in operating said road shall be paid out of the joint fund, each division of said road to be entitled to its proportion of revenue, and to be charged with its proportion of disbursements, and that the said receiver pay coupons of bonds in prior mortgages as heretofore."

II.

On the 12th of June, 1863, the following order in the Western Division case, (*Trans. No.* 182, p. 262:)

"On consideration of said petition of the Milwaukee and St. Paul Railway Company, and of the arguments of counsel, it is ordered by the Court that there be delivered over to said Milwaukee and St. Paul Railway Company, all and singular, the railroad between the city of La Crosse and Portage city, its road-bed and track, with its depots, station-houses, engine-houses, and all other property belonging to said railroad between the said points; and the forty box cars mentioned and described in the decree.

"And also the share and proportion of the rolling stock and personal property purchased by the receiver, as mentioned in the decree.

"And also, *subject to other or previous liens or claims*, the possession of the rolling stock on hand when the receiver took the same under order of the Court.

"And it is further ordered by the Court, that the said receiver be and hereby is discharged as such from the management and control of the said Western Division of said railroad under the appointment in this case, subject, however, to the final settlement of his accounts, *and subject to the orders* made or to be made in this case, and in the other cases in which he was appointed or may hereafter be appointed."

III.

On the 12th of June, 1863, the following order in the Eastern Division case (*Trans. No.* 182, p. 358):

UNITED STATES DISTRICT COURT.

GREENE C. BRONSON, AND JAMES T. SOUTTER,
vs.
THE LA CROSSE & MILWAUKEE RAILROAD COMPANY, and others.

June 12th, 1863.—A petition in writing of the Milwaukee and St. Paul Railway Company having been presented to the Court and filed in the case of Greene C. Bronson, James T. Soutter, and Shepherd Knapp, against the La Crosse and Milwaukee Railroad Company, and others, setting forth in substance, that in pursuance of a decree of this Court in that case, the Western Division of the La Crosse and Milwaukee Railroad, between La Crosse and Portage City has been sold, and that said sale was confirmed and perfected. And that said Milwaukee and St. Paul Railway Company, is a corporation organized under the laws of the State, as granted under said sale, and praying to be allowed to operate the whole line of road between La Crosse and Milwaukee as a continuous road, as directed and authorized by the act incorporating the La Crosse and Milwaukee Railroad Company. And the said petition having been argued by Messrs. Cary and Lynde in support thereof, and by Messrs. Hubbell and Carpenter on behalf of Charles Howard, a judgment creditor of the La Crosse and Milwaukee Railroad Company, who is prosecuting a judgment creditor's bill, and of the Milwaukee and Minnesota Company, in opposition thereto. *And the Court being satisfied that the policy of the State and the interests of the public, and of the creditors of the La Crosse and Milwaukee Railroad Company require that the Court should not continue further to operate by its receiver, and part of the said railroad between La Crosse and Milwaukee, but that the whole line of said road should be operated without interruption or embarrassment by a responsible corporation. And the Court being satisfied that its possession and control by a receiver of the Eastern Division, between Portage City and Milwaukee, might effect the rights of the public,* and embarrass the free and proper operation of the whole road as required by the original grant of charter, and also prejudice the interests of creditors of the La Crosse and Milwaukee Railroad Company. And it being represented to the Court, that persons interested in the Milwaukee and St. Paul Railroad Company, own or control

bonds included in the mortgage to these complainants, and the subject of this suit to the amount of four hundred and seventy-eight thousand dollars, being nearly one-half of the whole amount of said mortgage.

It is thereupon ordered by the Court that the order appointing a receiver in the case be modified in the manner following, *subject to any further or other order rescinding altering or modifying this order now here made:* That the receiver let the said Milwaukee and St. Paul Railroad Company into the possession of the Eastern Division of the La Crosse and Milwaukee Railroad from Portage City to Milwaukee, with the appurtenances and property and rolling stock thereto belonging. *And that the said Milwaukee and St. Paul Railway Company, subject to the further order or orders of the said Court,* operate said Eastern Division of said railroad in connection with the said Western Division thereof, so that one continuous line of railroad between La Crosse and Milwaukee may be operated and conducted as directed in the original charter of the La Crosse and Milwaukee Railroad Company, without hindrance, interruption, or diversion, the same as if the whole line of road continued to be in one company in pursuance of said charter, and not otherwise.

And it is further ordered by the Court that the said Milwaukee and St. Paul Railway Company shall at all times allow and permit the receiver, or such other persons as may be at any time appointed for that purpose, to have daily access and examination of the records, books, papers, accounts, proceedings, receipts, and revenues, and also of the transactions of the said Milwaukee and St. Paul Railway Company, and of its Board of Directors, in relation to the business and operation of the whole line of road, and that the said Railway Company shall, out of the revenues of said road, keep the said Eastern Division and all the rolling stock in good order, and defray all running and other necessary expenses, and at the end of every month deliver to the said receiver, or such other person as may be appointed, a full and detailed account of all revenues arising on the whole road, and of all necessary disbursements out of the same, and pay over monthly to the receiver the portion of the Eastern Division of the net revenues of the said railroad. And that the receiver make monthly returns as heretofore of his accounts into Court, and disburse the moneys by him received from time to time in the payment of liens and debts of the said La Crosse and Milwaukee Railroad Company, according to their priorities and equities.

And it is further ordered by the Court, that before the said Milwaukee and St. Paul Railway Company be permitted to have possession under this order, the said Company, by its constituted officers, shall enter into bond to the United States for the use and benefit of all interested, with sureties to be approved by the Court, in the penalty of one hundred thousand dollars, conditioned that the said Company will faithfully comply with this order of Court this day made, and any subsequent orders relating to the operation and management of the said railroad between La Crosse and Milwaukee, and will keep said road and the rolling stock and property in good order, and shall manage and conduct the same to the best advantage of the public and the creditors of the La Crosse and Milwaukee Railroad Company, and shall make monthly returns and pay over the net revenues of said road, according to this order.

A similar order was made at the same time in the Howard suit, in which Crocker had also been appointed receiver.

Judge A. G. Miller, in his opinion delivered September, 1863, (*Trans. No.* 182, p. 443,) states the purpose and effect of these orders made by him, as follows:

"*The only legitimate question* before the Court in June last, when the order modifying the action of the receiver was made, and now is, how is the road to be operated during the pendency of the appeal, as an entire road, *under the grant of charter to the best interests of the parties, the creditors and the public?*

"It was conceded that the use of the road could not be obstructed at Portage City; but that the cars must be run through the whole length of the road. Upon the best consideration I could give the subject, the order was made modifiying the order appointing the receiver, and allowing the Milwaukee and St. Paul Company, the owners of the Western Division, to operate the Eastern Division under the supervision of the receiver, and subject to the full and complete control of the Court, even to a removal if the Company fails faithfully to comply with the order and with ample security for the revenues of the road.

"This order was intended to prevent a diversion of the travel and business on the Western Division from the Eastern, and to save the expense of two sets of employees and to prevent interruption of the public.

"The requirement is, that the St. Paul Company, being the owners of the Western Division, must use the whole road

without diversion of business or obstruction to the prejudice of the Eastern Division. *The Eastern Division is not operated by the St. Paul Company upon any principle of right; but merely subject to the control of the Court for the time being.*"

The same Judge, in an opinion delivered at April Term, 1864, of the Circuit Court, says, (*Trans. No.* 182, p. 448):

"The first duty of the Court is to secure the interests of the public, under the grant of the charter of the La Crosse Company. The second duty is to protect the rights of the lien creditors and the parties litigant. The receiver was appointed for these two purposes.

"For this purpose the orders of the 12th June, 1863, in this case and *in the Howard case* modifying the original orders appointing the receiver were made. The Milwaukee and St. Paul Company were allowed by those last orders to operate temporarily the Eastern Division of the road in connection with the Western Division, of which they were owners, for the sake of economy in operating the road *to secure the use of all the rolling stock on the whole line, and to restrain the St. Paul Company from diverting trade and travel from the Eastern Division.* It was known that the St. Paul Company were about to connect their division from Portage City with the Watertown road, and thence to Milwaukee, *which might effect the Eastern Division.*

"The order allowing that Company to operate the Eastern Division, subject to the control of the Court, and the supervision of the receiver, and under heavy bonds with adequate security, *prohibited them from putting a car on their extension from Portage or any other road east of that point.* I considered it a proper duty to the public and the parties *to secure the use of a continuous route, according to the charter, without interruption or deviation of trade or travel* between the *termini* of the road.

"There is a disposition not to discriminate between these orders for the temporary and conditional operation of the road by the St. Paul Company, and an order for the absolute and adverse possession of the Minnesota Company.

"The order of the 12th of June in the Howard case was made in the Circuit Court where the bill was pending, and in this case in the District Court.

"The order of the District Court in this case was made under the universal belief that, according to the opinion of the Supreme Court, the record remained in the District Court for its proceedings as a final decree, under the act of March 3, 1863. The Supreme Court having since announced that

the record should have been transferred to the Circuit Court, under the act of July 15, 1862, the order of the District Court is to be considered of no validity, and it is my duty to order it rescinded. For the reasons here given, *the orders of the 12th of June*, 1863, will be rescinded, and the Eastern Division and appurtenances restored to the receiver under his original appointment."

On the faith of the offers of the St. Paul Company in their petition, and by these orders, that the Company was virtually appointed receiver of the Eastern Division and the rolling stock appurtenant to it, obtained, and went into possession thereof, and has continued in the possession of the rolling stock ever since; has diverted it from the La Crosse Railroad, and retains it still in violation of orders and decrees of District, Circuit, and Supreme Courts, (*Trans. No.* 182, pp. 122, 124, 125, 155,) and claims now to be the owner thereof. (*Trans. No.* 182, *p.* 424.)

This Court has decided (in 1 Wallace, 406,) that these orders in the Eastern and Western Division foreclosure cases are void for want of jurisdiction in District Court, and the District Court has itself ordered (*Trans.* 182, *p.* 491) in the Eastern Division cause, as follows:

"April 28, 1864. This day ordered by the Court that the order of the 12th June, 1863, modifying the order appointing the receiver, whereby the Milwaukee and St. Paul Railway Company were placed in possession of the Eastern Division of the road, be, and the same is hereby rescinded, and that the Milwaukee and St. Paul Railway Company return to the receiver the said road and appurtenances and rolling stock received under said order, and all property relating to said Eastern Division."

A similar order was made in the Sebre Howard suit. *See p.* 26 *of Mr. Cary's brief.*

As condition of obtaining possession the St. Paul Company, on the making of the order of June 12, 1863, executed the following bond, (*Trans. No.* 267, *p.* 18):

"Know all men by these presents, that the Milwaukee and St. Paul Railway Company, as principal, and David M. Hughes, Alexander Mitchell, Russell Sage, Fred. P. James, N. A. Cowdray, Horace Galpin, William H. White, George W. Rogers, Selah Chamberlain, and Asahel Finch, as sure-

ties, are held and firmly bound unto the United States of America, for the use and benefit of all interested herein, in the penal sum of one hundred thousand dollars, lawful money of the United States of America, to be paid by the said obligee, its assigns, or any party interested herein, to which payment well and truly to be made to the said obligee, the said obligors bind themselves, their heirs, executors, administrators, and assigns, firmly, by these presents.

"Sealed with our seals, and dated this twelfth day of June, in the year one thousand eight hundred and sixty-three.

"The condition of this obligation is such that, whereas, the District Court of the United States for the District of Wisconsin, in a certain case therein pending, wherein Green C. Bronson, James T. Soutter, and Shepherd Knapp, are complainants, and the La Crosse and Milwaukee Railroad Company, and others, are defendants, made a certain order, bearing date on the twelfth day of June, A. D., 1863, directing the receiver to let the said Milwaukee and St. Paul Railway Company into possession of the Eastern Division of the La Crosse and Milwaukee Railroad, between Pontage City and Milwaukee, with its appurtenances, property, *and rolling stock belonging thereto*, and directing said Milwaukee and St. Paul Railroad Company, subject to the further order or orders of said District Court, to operate said Eastern Division of said railroad in connection with the Western Division thereof, from Portage City to La Crosse, so that one continuous line of railroad between La Crosse and Milwaukee might be operated and conducted as directed in the original charter of the La Crosse and Milwaukee Railroad Company, without hindrance, interruption, or discussion, the same as if the whole line of road continued to be in one company, in pursuance of said charter, and not otherwise.

"And further directing that the said Milwaukee and St. Paul Railway Company shall, at all times, allow and permit the receiver, or such other persons as may be at any time appointed for that purpose, daily access and examination of the records, books, and papers, accounts, proceedings, receipts, and revenues, and also of the transactions of the said Milwaukee and St. Paul Railway Company, and of its Board of Directors, in relation to the business and operations of the whole line of road, and that the said railway company should, out of the revenues of said road, keep the Eastern Division and all the rolling stock in good order, and defray all running and other necessary expenses, and at the end of

every month deliver to the said receiver, or such other person as may be appointed, a full and detailed account of revenues arising on the whole road, and of all necessary disbursements out of the same, and *pay over monthly to the receiver* the proportion of said Eastern Division of net revenues of the said road.

"Now, therefore, *if the said Milwaukee and St. Paul Railway Company shall faithfully comply with said order of said Court, and all subsequent orders relating to the operation and management of the said railroad between La Crosse and Milwaukee, and shall keep said road and the rolling stock and property in good order, and shall manage and conduct the same to the best advantage of the public* and the creditors of the La Crosse and Milwaukee Railroad Company, and shall make monthly returns, and pay over the net revenues to the said road according to said order, then this obligation to be null and void, otherwise to remain in full force and virtue."

The decree of foreclosure and sale in the Eastern Division case, made September 28, 1865, in Circuit Court, (*Trans. No.* 212, pp. 36, 38,) contains the following provisions:

"A description of the property authorized to be sold under and by virtue of this is as follows, viz:

"All and singular the railroad of said company, commencing at the city of Milwaukee and running thence to Portage City, * * * * * and also all and singular the locomotives, engines, cars, and rolling stock, and all the materials, tools, implements, and utensils, and other personal property which had been procured for and used in connection with said roads, or either of them, prior to the appointment of Hans Croker as receiver of said road, except forty box cars, numbered respectively 330, &c., and including as part of said mortgaged premises such proportion of the rolling stock, bought by the receiver since his appointment, as the net earnings of the Eastern Division of said railroad bear to the earnings of the Western Division, as ascertained by the report of H. L. Palmer, and as confirmed by the court.

* * * * * * * * * *

"It is further ordered and decreed that this decree shall not prejudice the rights of the Milwaukee and Minnesota Railroad Company under the order of the Court in this cause, made on the 10th day of July, A. D. 1865, providing for the entry of said Company into possession of the said mortgaged premises on certain terms and conditions fixed by said order,

and the said Milwankee and Minnesota Railroad Company shall be at liberty to avail itself of the provisions of the said order, notwithstanding this decree, at any time before the sale of said mortgaged premises in this cause."

H. L. Palmer had, on April 28, 1864, been appointed an auditor (*Trans. No.* 280, *p.* 67) to report on receiver's account, and the receipts and disbursements of the St. Paul Company since June 12, 1863.

8th of October, 1864, an order was made in this suit, (*Trans.* 182, *p.* 1,) requiring "the auditor to ascertain and report what should be charged for the use of rolling stock formerly used on said railroad as part of the accounts reported by him." All parties interested, including the St. Paul Company, appeared before the auditor and litigated the matter referred to him. The complainants and the St. Paul Company appearing by Mr. John W. Cary as their counsel. (*Trans. No.* 182, *pp.* 69, 82, 83.)

The auditor made his report upon all the matters referred to him 28th of June, 1865. (*Trans. No.* 182, *p.* 69.) By this report he found there was due to the Eastern Division case from the St. Paul Company $327,118.52.

Schedule B annexed to this report shows the items making up this balance, and includes the item objected to by appellants for use of railway stock belonging to Eastern Division from June 13, 1863, to February 28, 1865. (*Trans. No.* 182, *p.* 81.)

The amount actually claimed by the Minnesota Company before the auditor, as appears from their statement, p. 314, (*Trans. No.* 182,) was $1,078,372.38.

It will appear by the stipulations, (*Trans. No.* 182, *pp.* 363, 399, 491,) that besides the evidence reported by him the auditor had before him the record in the land grant foreclosure case, (*No.* 159, *December Term*, 1866,) the orders appointing the receiver and all orders affecting the receiver in any way whatever; the whole record in this case, and the various opinions of the District Court.

To this report of the auditor the St. Paul Company interposed five exceptions. (*Trans. No.* 182, *p.* 505.) The Min-

nesota Company interposed eleven exceptions, (*Trans. No.* 182, *p.* 497,) and afterward an additional twelfth exception, (*Trans. No.* 182, *p.* 509,) calling attention to an oversight of the auditor in auditing the charge for use of rolling stock from September 1, 1864, to February 28, 1865.

Thereupon the Court referred this twelfth and additional exception back to the auditor to see if it was well founded, and if so to report how much additional should be allowed for what had been omitted. *Page* 511.

The auditor made a supplemental report on this additional exception, allowing $86,466.54 for the use of rolling stock in addition to what was before reported, *page* 533; to which the St. Paul Company put in three exceptions. *Page* 543.

The auditor's report and all the exceptions thereto having been brought to a hearing on the 18th of July, 1865, the Court (*Trans. No.* 182, *p.* 550) sustained the fourth and fifth exceptions of St. Paul Company to the report, and modified the report accordingly. It overruled the first, second, and third exceptions of St. Paul Company to the report, and all their exceptions to the supplemental report. As to the exceptions of the Minnesota Railroad Company, the Court overruled the first, second, third, fourth, fifth, sixth seventh, ninth, and tenth. It overruled the sixth exception "without prejudice to the right of that Company to proceed against Hans Crocker, receiver, for contempt of Court, for misfeasance or malfeasance as receiver, and without prejudice to any proceedings against said receiver for damages, for misfeasance or malfeasance as receiver." (*Trans. No.* 182, *p.* 551.)

It sustained the eighth exception of the Minnesota Company to the original report. *Page* 551.

It also overruled exceptions of Minnesota Company to the supplementary report, and confirmed the report as to the charge of $86,466.54; and found the balance due from St. Paul Company to the receiver to be $364,188.58. *Page* 550.

The principle upon which the auditor acted in charging for the use of the rolling stock is clearly and distinctly stated in supplementary report. (*Trans. No.* 182, *p.* 535.)

The testimony of Goodrich, on which the auditor made his computation, "*p.* 104, printed testimony," will be found, (*Trans. No.* 182, *p.* 85.)

This principle is one that is well known as in universal use among railroads in this country, and is that of charging so much per mile for the actual use of rolling stock. The fair rate of mileage was proved by Mr. Goodrich, at *page* 85, and the actual amount of miles traveled was proved before the auditor.

There were no contradictions on the subject, so that this appeal does not present any question as to the rate of allowance or the number of miles traveled.

The following are the exceptions which the appellant's object were disallowed:

The first exception of the St. Paul Company: Excepts to so much of the report as disallows its claim for the use of the rolling stock, as charged and contained in Exhibits E and E continued, attached to said report, to wit: First item No. 39 of Exhibit E for the sum of $166,192.30; second item No.— of Exhibit E continued for the sum of $36,118.86; so much of item 38 of Exhibit E as was disallowed by said auditor, amounting to the sum of $17,179.69; all of which said amount should have been allowed and credited as contained in said Exhibits E and E continued.

The second exception of the St. Paul Company: Excepts to so much of the report as finds that only forty box cars and such proportion of the rolling stock as was purchased and put on the road by the receiver as the net earnings of the Western Division from the 11th of June, 1860, to the 13th day of January, 1862, bear to net earnings of the Eastern Division for the same period of time is owned by the Milwaukee and St. Paul Company, and that all the remaining stock on the road on the 13th day of June, 1863, belonged to and was owned by the owners of the Eastern Division of said road.

The third exception of the St. Paul Company: Excepts to so much of the report as charges it for the use of the share of the rolling stock belonging to the Eastern Division on the Western Division, and on its other roads from the 13th day of June, 1863, to the 28th day of February, 1865, the sum of $123,374.40; whereas the auditor should have found and reported that no part of said rolling stock, which was on said road on the 11th day of June, 1860, when the receiver took

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The third exception of the St. Paul Company: Excepts to so much of the report as charges it for the use of the share of the rolling stock belonging to the Eastern Division on the Western Division, and on its other roads from the 13th day of June, 1863, to the 28th day of February, 1865, the sum of $123,374.40; whereas the auditor should have found and reported that no part of said rolling stock, which was on said road on the 11th day of June, 1860, when the receiver took

possession, was in the possession or under the control of said receiver or of the Milwaukee and St. Paul Company as receiver, or in the custody or control of the Court after the 12th day of June, 1863; but that the same was in the possession and control of the St. Paul Company as owner.
(*Trans. p.* 505.)

To the supplemental report of the auditor, the St. Paul Company took the following exceptions, all of which were disallowed: (*Trans. p.* 543.)

First, The Milwaukee and St. Paul Company excepts to so much of said report as charges said company for the use of rolling stock belonging to the Eastern Division on the Milwaukee and St. Paul Railway from September 1, 1864, to February 28, 1865, the sum of $86,466.50: whereas said auditor should have reported that no part of the rolling stock belonging to the Eastern Division was used on the road of the Milwaukee and St. Paul Railway Company from and after the 1st day of September, 1864.

Second, The Milwaukee and St. Paul Company excepts to so much of said report as finds, upon a certain hypothesis which is not found to exist, said company should be charged for the use of rolling stock used on "its road belonging to the Eastern Division from the 1st day of September, 1864, to the last day of February, 1865, both inclusive, the sum of $90,668.31;" whereas, said auditor should have found and reported that no part of the rolling stock belonged to said Eastern Division was used on the road of the Milwaukee and St. Paul Railway Company between the dates specified.

Third, The Milwaukee and St. Paul Railway Company excepts to the report of said auditor for the reason that it is in the alternative hypothetical and indefinite.

A. The second and third exceptions to the supplemental report may be disposed of at once by the observation that the part of the report characterized in their exceptions as "in the alternative hypothetical and indefinite," were not acted on or confirmed, and no charge was made against the St. Paul Company as to that part of the report, but the previous part of the supplemental report which was not hypothetical, indefinite or in the alternative, and which charged the St. Paul Company for the use of rolling stock from September 1, 1864, to February 28, 1865, with the sum of $86,466.54, is

the only part of the said supplemental report which was confirmed.

(*Trans. pp.* 536, 551.)

B. Exhibit E and Exhibit E continued, to which the first exception refers, is a statement made up from the books of St. Paul Company, and claimed by that company to be correct, (*Trans. pp.* 76, 117,) and this exception assumes that it is a correct statement and claim. Of course this statement and claim is upon the theory that the St. Paul Company owned all the rolling stock on the road when the receiver took possession, instead of only forty box cars thereof, and the disallowed items rest on this basis. The auditor rejected and corrected all of these items on the theory that the St. Paul Company owned only forty box cars of all the rolling stock on the road when the receiver took possession, (*Trans. pp.* 76, 77, 78,) and its proportionate part of the rolling stock purchased by the receiver.

If the auditor was right in this theory the first exception was properly overruled.

The second and third exceptions of the St. Paul Company to the report, and the first exception to the supplemental report of the auditor, present exactly the same question, and no other.

Does the St. Paul Company own any other rolling stock than forty box cars and its proportionate share of the rolling stock purched by the receiver, as fixed by the orders of the court in both foreclosures, and did not all the rest belong to the Eastern Division? If the St. Paul Company owned no more, and the rest belonged to the Eastern Division, then all the exceptions were properly overruled.

Now, all this was *res adjudicata* in this suit; it had been solemnly settled by the references in each suit, the report on these references, the confirmation thereof, the decree of sale in the Land Grant foreclosure, the sale on that decree, the decrees and opinions of the circuit and district judges in both foreclosure suits, and finally and most solemly in the

Supreme Court, in 2 Wallace, 641, where the court concludes its opinion as follows:

"We have thus examined, with care and patience, *the mortgage*, and the various orders and decrees of the District Court, on which the claim of the Milwaukee and St. Paul Railway Company to the ownership of this property depends. There is in all of them some want of clearness and precision, including the mortgage itself. *Before the court ordered the sale it should have made clear all these ambiguities.* It evidently attempted to do so, and *we think if it has not in all cases effected that purpose fully, it has furnished the criteria by which it can be done.* And although the language of its orders is not always free from doubt, we have been able to satisfy ourselves of the court's intentions.

"*The title of appellant is clear on the record*, unless it has been divested by these proceedings. *We think that they do not confer title to the rolling stock on the Milwaukee and St. Paul Railway Company, nor divest the appellant*, except as to the forty box cars, and the proportion of the stock purchased by the receiver, which the net earnings of the Western Division bore to the net earnings of the Eastern Division, *and that* THEY *also decide that the mortgage under which they claim did not include any more.*"

And under this head the court is respectfully referred to all the opinions of the district judge, given on various occasions in both foreclosure suits, and also to the Brief which I had the honor recently to submit to the Court in No. 203, *December Term*, 1866.

I beg leave also to refer to the following extracts from the opinions delivered by Mr. Justice Miller, of the United States Supreme Court, sitting as circuit judge of the ninth circuit, in the district of Wisconsin, on the 28th of April, 1864:

"The mandate of the Supreme Court, which is now before us in the Circuit Court, directs us to ascertain the amount of interest due on these bonds on the first day of March last, after deducting such sums as may be in the hands of the receiver applicable to that purpose; and that if that sum, with the accruing interest and costs, is not paid within twelve months from the date of the order ascertaining the amount, then the road is to be sold.

"*The Milwaukee and Minnesota Railroad Company* now comes forward and proposes to pay this sum within a short time, to be fixed by the Court, say twenty or thirty days, and asks that an order be made that upon such payment the receiver be discharged, and directed to deliver to said company the railroad from Milwaukee to Portage, with the rolling stock and other appurtenances properly belonging thereto; and asks that a similar order be made in the Howard suit.

"The granting of this order is resisted by the plaintiffs in the Bronson and Soutter foreclosure suit, by the plaintiff in the Howard suit, and by Selah Chamberlain, and by a party describing itself as the Milwaukee and St. Paul Railroad Company.

"It is very obvious that if the plaintiffs are paid all that is due them on their mortgage, the order appointing a receiver in this suit should be discharged, unless some very stringent reason exists for its continuance; and in that event it becomes the duty of the Court to enquire what it will do with a road thus left on its hands, with no further right to hold it, except that arising from the claim of Howard, which will be noticed hereafter.

"The Milwaukee and St. Paul Railway Company is an organization created since the litigation commenced. It is no party to either of the suits named. *It has no shadow of right to the property in question*, yet the personal interests of its corporators are obvious. Owning the Western end of the La Crosse and Milwaukee Railroad from Portage to La Crosse, 105 miles, and organized for the purpose of operating a road, as its name imports, from Milwaukee to St. Paul, the ownership and control of the Eastern end is indispensable to their purpose. They say, in their answer to the petition of the Milwaukee and Minnesota Company, that their corporation and its directors own eight hundred and twenty-four of the bonds secured by the Bronson and Soutter mortgage. They came before the District Court in June last and procured an order that the receiver should deliver to them the Eastern end of the road and all its appurtenances, and they have used them from that day to this as they pleased.

"The Supreme Court declared the proceeding in the District Court to have been without jurisdiction, and the order a usurpation of authority, *yet they come forward now and insist upon being continued in the possession thus illegally acquired.*

"I say they have no shadow of legal claim to the possession of this property. The pretense that in buying the Western end of the road under a mortgage foreclosure they also bought the franchises of the Eastern end, including the right to run it exclusively, and leaving to the owners of the Eastern end, and its prior mortgages, no other right than to receive from them a rent for such use, does not deserve a moment's serious consideration, and will receive from me no other attempt at refutation than the bare statement of the proposition.

"But while *their legal rights* are thus weak, their interest in the matter is of the strongest character. The necessities of their situation require that they should own the eastern end of the road to complete their line from Milwaukee to St. Paul. They own nearly all the bonds secured by the mortgage to Bronson and Soutter.

"Although the Supreme Court has declared that the Milwaukee and Minnesota Company *own* the Eastern Division, the exigencies of the Milwaukee and St. Paul Company require that *they* should own it.

"It is from this source that springs all the fierce opposition to the discharge of the receiver, and to *placing the property in the hands of its owners.*

"The Supreme Court pursued the extraordinary course of taking from the Circuit Court the discretionary power of limiting the time usually given in the foreclosure decrees to pay the money. It also decided that the time in which the payment might be made should be twelve months instead of ninety days, which is the most usual period. And this was done in a case where the plaintiffs had already been four years prosecuting their suit. The reason for this extraordinary case is obvious. It was to enable the Milwaukee and Minnesota Company, which that Court declared to be the owner of the road, to redeem what they considered an immensely valuable property. But this just and benevolent design of the Court is to be defeated by keeping the control of the road in the hands of those *whose interests require it to be sacrificed and sold, that they may buy it in.*

"The owners of the road here proffer to pay every dollar that is due on it, which is uncontroverted, prior to their own claim, and are ready to litigate disputed claims if they can get possession; *yet, for the benefit of those who have no claims, whose interests require them to have their neighbors' property right or wrong,* we are to refuse possession of this valuable property to its true owners, and continue it in the hands of those who will favor this sacrifice.

"I do not trust myself to any expression of the feelings such a course must naturally generate in the bosom of any honest judge, but content myself with placing on the record of this Court my solemn protest and my regret at my utter inability to prevent it."

I also refer to the following extracts from the opinion delivered by Mr. Justice Miller at the April T., 1866, of the Circuit Court.

"At the April Term, 1864, of this Court, the mandate of the Supreme Court was filed in this case, directing this Court to enter a decree in favor of plaintiffs, for full amount of their bonds and interest, and after deducting whatever sum might be in the hands of the receiver applicable to the payment of said interest, to give the defendant a year in which to pay the remaining interest, and if not then paid, to sell the road and its appurtenances.

"The Minnesota Railroad Company, who owned the equity of redemption, thereupon offered to pay into Court the sum due plaintiffs, on condition that the receiver should be discharged, and the road and all its rolling stock placed in posseseion of said Company. A motion to this effect was made, and was resisted by many parties; and *among others, by the Milwaukee and St. Paul Railway Company, which had the actual possession of said road and rolling stock.* The Judges of this Court being divided in opinion on this motion, it was overruled; and the case was carried to the Supreme Court on other matters involved in the final decree.

"The Supreme Court reversed the order overruling the motion of the Minnesota Company, and sent down its mandate directing that an order be entered to discharge the receiver, and let the Minnesota Company into possession, if it should, within a time to be fixed by the Court, pay all that was due on the mortgage, which is the foundation of the suit.

"This order was accordingly made by the Court, on the 18th July last, allowing the Minnesota Company to redeem by payment the sum due, at any time before the sale of the property, which was to take place if the money was not paid within a year from the decree of September, 1864, and ordering that if the money was so paid, that then the receiver and the St. Paul Company should deliver the road and all the rolling stock in controversy to the Minnesota Company.

"On the 1st January last, the Minnesota Company paid the whole amount, interest and costs, that was then due on

said mortgage, and demanded of the receiver and of the St. Paul Company that they should deliver possession of all that the order of the Court required. * * * * *

"The respondents (St. Paul Company) say further, that since said order was made, they have discovered a mortgage of said rolling stock, made long ago to Bronson, Soutter, and Knapp, which is a paramount title to said property, and therefore it should not be delivered to the Minnesota Company.

"This Company, however, being owners of the equity of redemption, are entitled to possession until foreclosure, and I do not perceive that the mortgage to Bronson, Soutter, and Knapp, confers upon the respondents any right to that possession, much less any right to disobey the decree of this Court.

"Several other technical, and as I think frivolous, reasons are given why respondents should not be compelled to execute the decree which I shall not further notice.

"There is one reason, however, and the only real ground on which, as I apprehend, respondents have acted, which I will notice. They say they are the real owners of the property in dispute; that that property is still in litigation, as they are prosecuting appeals from all judgments deciding otherwise; and that it would be great hardship to take the property out of their possession, pending this litigation, especially as it would leave them without stock enough to work their road.

"I am quite sensible of the force of this reason, and have given to it all the consideration which it deserves; and if I could see any right which I had to interfere, I might endeavor to do something to compromise or mitigate the immediate hardship complained of.

"It is to be observed, however, that this claim of respondents to the property is the very matter which was passed upon in the decree now to be executed. No supersedeas bond was filed or appeal taken to stay the execution of the decree, until the case could be heard in the Supreme Court. Besides, *this very decree was entered in pursuance of the mandate of that Court.* The *only title ever yet set up*, so far as I know, to that property by the respondents *was declared by the Supreme Court to be invalid;* for, as I have already shown, a mortgage to Bronson, Soutter, and Knapp can give no title to the St. Paul Company, and may never ripen into an absolute title in any one. Nor are they mortgages in possession, for they are not mortgages at all, or even assignees of the mortgage.

"*This Court has at least three times decided that the St. Paul Company has no title to said property.* The presumption is in favor of the correctness of these decisions. Certainly, in this Court I am bound by them. Now, if these decisions be sound, it follows that for nearly four years the St. Paul Company *has had wrongful possession of this stock. Is it not time it should be given up?* Suppose, however, that these decisions are wrong, and shall be finally reversed, then their property will be restored to them in less than half the time which they have wrongfully held it, if these decisions are right.

"*Under the decree* which is here complained of, the Minnesota Company has paid nearly *half a million of dollars on the faith of obtaining possession of this property*, when they had complied with that condition.

"They had demanded this decree as a condition precedent to investing so much money in an already heavily incumbered road.

"How can this Court, with any pretence of justice, now turn on them and say, we will not enforce this decree ?"

It was therefore the law of this case, to be followed, when once established, in all future proceedings therein, until reversed by the *Supreme Court*, that of the original rolling stock only forty box cars belonged to the Western Division. This law had been established before the inquiry before the auditor commenced, and established not only in this case, but in the sister case, on the sale wherein the St. Paul Company obtained its title and its only title.

It is very clear, therefore, that the auditor had no power to open this question, or to allow it to be litigated before him. Any attempt to litigate the question before him, to disturb this law of the case would have been futile, and if the St. Paul Company have succeeded in getting before the auditor any evidence in conflict with this law of the case, (which is by no means conceded,) the Minnesota Company had a right, and the auditor was bound to disregard such evidence. As before the auditor it was clearly irrelevant. The report of the auditor shows he considered himself bound by this law of the case. (*Trans. No.* 182, *p.* 77.)

The incongruity and absurdity of the auditor, appointed at

the stage, was, and with his limited powers, attempting to reverse this previous settled law of the case is too obvious to require to be pointed out.

Again the St. Paul Company having obtained possession as receiver, as will be shown further on, and on the basis that they owned only forty box cars when they came to discharge themselves of the obligations assumed by them in their obtaining possession, (which, as to the St. Paul Company, is the real meaning of the inquiry before the auditor,) are *estopped* from claiming ownership in more than forty box cars.

Finally as to these exceptions, the St. Paul Company are seeking by this appeal an entirely inappropriate remedy—a remedy which, if it exists at all, exists only in the appeal, No. 103, December term, 1866.

Of the points raised by the exceptions there remains only the allowance of the Court of the eighth exception of the Minnesota Company to the report of the auditor. The eighth exception is as follows: (*Trans. No.* 182, *p.* 501.)

8th Exception. For that the said auditor has allowed as a credit the sum of $27,497.84 for new buildings erected by the Milwaukee and St. Paul Railway Company without order of this Court, and reported thereon as follows:

"The item No. 28, contained on the credit side of the account, 'Exhibit E,' new buildings $27,497.84 is also specially excepted to by the Milwaukee and Minnesota Railroad Company in and by Exhibit K K K. I have ascertained and report that the sum was expended for the erection of new buildings on the machine-shop grounds in Milwaukee, extension of depot buildings, erection of water-houses, and other improvements on the Eastern Division; that *all these erections were not necessary for the Eastern Division operated as a road commencing at Milwaukee and terminating at Portage City*, and not forming a part of a through route to the Mississippi river, that these improvements were projected and commenced, and the expenditures mainly made while the two divisions of the road were operated together as one through line, and before the opening of another route from Portage City to Milwaukee was contemplated, and that as the said railroad from Milwaukee and Portage City was then circumstanced these buildings and improvements were necessary to its proper and profitable operation, and the expenditure

was properly and prudently made. I therefore audit and allow this credit, amounting to said sum of $27,497.84, to the Milwaukee and St. Paul Company, and disallow the said exception thereto.

"Whereas the said auditor ought to have disallowed said item of $27,497.84, for the reason that the same was not directed by any order of the Court, and was an unnecessary and improvident expenditure upon the mortgaged premises in this cause."

The building, the cost of which was disallowed by the Court, was found by the auditor to be not necessary for the Eastern Division operated as a road by itself, and only necessary or proper in reference to the Eastern and Western Divisions being operated under one management. They were erected without any order of the Court as the record shows, and the expenditure was an arbitrary expenditure by the St. Paul Company, looking to their own advantage and interest as owner of the Western Division. It is only necessary to consider how the St. Paul Company obtained possession of the Eastern Division, and what was its relation thereto, to see the propriety of the disallowance of this item. They obtained possession of the Eastern Division by presenting a petition to the District Court in both suits, and in which petition they as a condition of obtaining such possession offered to account to the receiver of the said Eastern Division for the net tolls and income under the direction of the Court and to submit to such other rules and regulations thereto as the Court might make. On such petition the Court put them in possession, by an order, which it declared to be an order modifying the order appointing the receiver, and for the declared object of promoting "the policy of the State and the interest of the public," which required that both divisions should be run as one road, by one corporation. In the order putting them into possession, the Court only authorized them as far as the Eastern Division was concerned, to operate the same in connection with the Western Division as one whole line. It also required the St. Paul Company to permit access to and examination of its books, and its business and transactions, and it required the said Company

out of the revenues of the road to keep the Eastern Division in good order, and to render monthly to the receiver an account of the revenues and disbursements of the whole road, and to pay over monthly to the receiver the Eastern Division's proportion of the net revenues of the road. The Court also required the St. Paul Company to give a bond in $100,000, conditional that the Company would obey this order of the Court and any subsequent orders relating to the road, and would keep the road and rolling stock in good order, and manage and conduct the same to the best advantage of the public and its creditors, and make the monthly returns and payments above mentioned. (*Trans. p.* 358.) The St. Paul Company gave such a bond. It is clear from this statement, that the St. Paul Company became thereby as to the Eastern Division a receiver thereof, under the original receiver, with all the powers and subject to all the obligations of such a receiver and no other. And in this point of view they have always been looked upon in all the proceedings in the Court below and by this Court. See *Trans. No.* 182, *pp.* 22, 23, 24.

And the appellants, in their Brief, concede this view to be correct; thus Mr. Carey (*p.* 26) says:

"The order of June 12, 1863, *in the Howard case, made the St. Paul Company the custodian of this property under the receiver, or, if you please, his agent, or a quasi receiver.*"

But whether a receiver or not their rights are limited by the terms and conditions of the order of June 13, above recited.

And it is very clear that neither under the terms of that order, or by any general power of a receiver, were they authorized to make the expenditure referred to in this exception. Being an unauthorized expenditure made for the benefit of the St. Paul Company, and of which they have probably reaped the whole benefit during the long period they ran the whole road, the Court is bound by law to disallow it. Nor can the St. Paul Company escape these positions, because this order of June 13, 1863, is void for want of jurisdiction of the Court. They are estopped from taking any such position. So long as they enjoyed the advantage

of possession under said order, they cannot repudiate the advantages to flow from the order to the party whose possession was thus divested, but the latter party has a right to call upon the Court to enforce in his favor all the beneficial provisions of the order.

It is understood that a general objection is made going to the whole report, being a jurisdictional objection, that the St. Paul Company is no party to this action, and that the Court has no jurisdiction to proceed against them summarily.

In addition to the facts just recited, as to the petition of the St. Paul Company as receiver, the Court are reminded under this head that the order of June 13, 1863, was vacated on the 28th of April, 1864, and an order made requiring them to deliver the Eastern Division and rolling stock thereon; on which occasion the receiver of the road pretends that he could not obtain possession of the whole rolling stock of the St. Paul Company, but was compelled by their contumacy to make a temporary arrangement for the further use of a part of the rolling stock, (*Trans.* 182, *p.* 22.)

Besides becoming connected with the suit by its receivership, and making itself a party by the presentation of its petition and the orders obtained therein, the St. Paul Company, without objection to the jurisdiction, appeared before the auditor by council, took part in all the proceedings before the auditor, examined and cross-examined witnesses before him, litigated without objection to the jurisdiction what amount they were bound to pay, took exceptions again to the auditor's report without objection to the jurisdiction, and argued these exceptions before the Court—succeeding in some of them.

It appeared before the Circuit Court in April, 1864, to oppose the application of the Minnesota Company for possession, and also in this Court in the appeal from the order denying that possession on the decision of which the mandate was issued, so that the objection comes at a late day with the accustomed ill-grace which distinguishes the St. Paul Company in this litigation.

It would be a singular omission in the law if a party could obtrude himself upon a litigation in a Court of Equity, and by covenants and agreements, and assuming obligations and respectful petitions, and promising to obey all future orders of the Court, obtain possession of the subject matter of the litigation as a temporary receiver, and when a Court of Equity should attempt to compel the performance of his covenant to account for the earnings of the property of which he had thus obtained possession, he can reply, "I am not a party to your suit; you have no jurisdiction over me in your action; your whole proceeding is as to me *coram non judice*." Fortunately this is not the law, and argument on this point, either by way of principle or authority, seems unnecessary, but the following extracts from the decision of this Court are conclusive on this subject:

Blossom *vs.* Railroad Co.; 1 Wallace, 655.

"Is the appellant so far a party to the original suit that he can appeal?

"It is certainly true that he cannot appeal from the original decree of the foreclosure, nor from any other order or decree of the Court made prior to his bid. It however seems to be well settled that after a decree abjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case in the course of subsequent proceedings, in such manner as to subject them to the jurisdiction of the Court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation which the Court is bound to protect. Surities, signing appeal bonds, stay bonds, delivery bonds, and receiptors under writs of attachment, become *quasi* parties to the proceeding and subject themselves to the jurisdiction of the Court so that *summary judgments* may be rendered on their bonds and recognizances—so in the case of a creditor's bill or other suit, by which a fund is to be distributed to parties, some of whom are not before the Court; these are at liberty to come before the master after the decree and establish their claims to share in the distribution.

"A purchaser or bidder at a master's sale in chancery subjects himself *quod hoc* to the jurisdiction of the Court and can be compelled to perform his agreement specifically. It

would seem that he must acquire a corresponding right to appear and claim, at the hands of the Court, such relief as the rules of equity proceedings entitle him to.

Minnesota Co. *vs.* St. Paul Co., 2 Wallace, 632, 634."

"The road and rolling stock, which are the subject matter of this controversy, were placed in the hands of a receiver in the progress of that suit; and he was in possession of the rolling stock when, by an order of the District Court, made June 12, 1863, in that suit and a similar order of the same date, in another suit, it was all delivered to the Milwaukee and St. Paul Railway Company.

"At the last term of this Court we decided (Blossom *vs.* La Crosse Railroad Company; 1 Wallace, 405,) that by the act creating the Circuit Court for the District of Wisconsin, the District Court lost its power to make such orders, and they were void. The consequence of this ruling is that in contemplation of law, this property is still in the hands of the receiver of the Court. If in the hands of receiver of the Circuit Court, nothing can be plainer than that any litigation for its possession must take place in that Court without regard to the citizenship of the parties. If it has been taken illegally from the custody of the receiver, it is equally clear that the Court has not lost thereby the jurisdiction over the property, or the right to determine where it shall go."

Again, speaking of the St. Paul Company, the Court says:

"It would indeed be very strange if these parties can come into Court by a petition and get possession of that which was the subject of litigation, and then when the wrong they had done by that proceeding is to be corrected, they shall be permitted to escape by denying that they were parties to the suit. In the case of Blossom *vs.* the Milwaukee and Chicago Railroad Company, 1 Wallace, 635, this matter was fully discussed, and it was then held, that a purchaser or bidder at a master's sale subjected himself *quod hoc*, to the jurisdiction of the Court, and became so far a party to the suit by the mere act of making a bid, that he could appeal from any subsequent order of the Court affecting his interest."

APPEAL IN No. 212.

This appeal (*Trans. No.* 212, *p.* 48,) is from so much of the order of 18th July, 1865, (*Trans. No.* 182, *p.* 552,) as directs the delivery to the Minnesota Company of "all the rolling stock that was on the whole La Crosse and Milwaukee

Railroad or belonged or appertained thereto, when the receiver was appointed, except forty box cars therein specified on certain conditions in said order named."

This order was issued as it recites on the mandate of the Supreme Court of the United States, (*Trans. No.* 182, *p.* 15,) being the mandate set forth on *page* 3 of this brief.

The order in no wise departs from the mandate. The mandate does not undertake to describe what rolling stock is appurtenant to the Eastern Division, and the order is therefore free to follow in that respect, and does follow the settled law in this case—namely, the distribution of rolling stock described in all the previous orders in both suits, and declared in 2 Wallace, *page* 642, to be, until reversed by the Supreme Court, the law of the case.

As to the objection that the order directs both the receiver and the St. Paul Company to deliver possession, I have already anticipated and answered the jurisdictional part of the objection. The other part of this objection, that the order appealed from is broader than the mandate, scarcely needs an answer, as it is perfectly clear that the mandate warranted such an order, not only against the receiver but against any and every person, deriving possession from him or from the Court in whose possession the property was.

HENRY A. CRAM,

Counsel for Appellees.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1866.

JAMES T. SOUTTER AND SHEPHERD KNAPP, Survivors of GREENE C. BRONSON, Deceased, Appellants,
vs.
MILWAUKEE AND MINNESOTA RAILROAD CO.
} No. 203.

BRIEF FOR APPELLEE.

The appellants are trustees in land grant mortgage on Western Division La Crosse and Milwaukee Railroad.

The appeal will be found on p. 2, *Trans. No.* 203.

It was taken July 15, 1865, from—

1. Report of masters, October 7, 1861, p. 115, *Trans. No.* 159;

2. Order of District Court, January 7, 1862, overruling the exceptions of appellants to that report, p. 136, *Trans. No.* 159;

3. Final decree, January 13, 1862, p. 428, *Trans. No.* 159.

The masters reported—p. 118:

"We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof, was at the date of the filing of the bill of complaint in this cause, five hundred and sixty-nine thousand six hundred and thirty-five dollars and seventy-eight cents; and an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount $623,235.78."

"And we have ascertained and do further report that of the said rolling stock *forty box cars,* amounting at the cost price thereof to $31,979.64, and numbered, (*setting them out,*)

are covered by and included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause; the said cars having been purchased with and by the proceeds of a portion of the bonds to which this mortgage is collateral; *and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter*, and bearing date on the seventeenth day of August, A. D. 1857."

The appellant's fourth exception to the report, (p. 133,) was as follows:

"4th. For that the said master and special masters have in and by their said report certified that *all the rolling stock on said road* (except forty box cars which are specially named in said report) *was covered by and included in the first mortgage* upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the 17th day of August, A. D. 1857."

Whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver, since the commencement of this suit, amounting to the sum of $53,600) was covered by, and included in, the mortgage given to the said cemplainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, 105 to 200 thereof was covered by the mortgage described in the complaint, and that to that extent the complainant's said mortgage was a first lien thereon.

The order of Court upon the exceptions contains the following, (*p.* 136:)

"And it is further ordered by the Court that the fourth exception of complainants be, and is hereby overruled as to the forty box cars, which are covered by their mortgage. And it is further ordered by the Court, that on said exception the said report be so modified that *all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars*, is covered by, and included in the

first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the Court has held possession, by it received, costing $147,942.63, be applied to the said mortgage, in this bill, in proportion to the net revenues on such portions of the road said mortgages respectively covered since the appointment of the receiver."

I

It is important *in limine* to understand who are the parties litigant on this appeal, their respective interests, and how far such parties are bound by the decision of this Court in this suit, in 2 Wallace, 609, and what remedies this Court may administer on this appeal. These determined, everything becomes very simple.

FIRST.

The parties—

a. The appellants are the plaintiffs in the foreclosure suit below, and are the trustees in the land grant mortgage.

b. The respondents are the defendants in that suit including the Milwaukee and Minnesota Company. The purchasers under the decree are not parties to this appeal, and cannot therefore be bound by the decision thereof.

SECOND.

The real interests of the parties—

a. The obvious and true interest of the appellants is to establish that only a part of the premises covered by their mortgage has been sold, and that they have a right to have the part omitted sold, or else the whole sale set aside, and the part previously sold and the omitted part sold together, (which latter course it will be shown is beyond the power of the Court.)

b. The interest of the Minnesota Company as owner of the equity is to have it established, that all the premises mortgaged have been sold, and that of the rolling stock that came to the hands of the receiver, only forty box cars were covered by the mortgage.

c. The St. Paul Company, the actural purchaser, is not represented on this appeal, is not a party to the suit, and

has no interest in having the sale, or the decree directing the sale, disturbed; and whatever interest it has, is not only not represented by the appellants, but the interest of the latter on this appeal is hostile to the St. Paul Company.

THIRD.

How far has 2 Wallace, 609, (a decision in this very suit,) settled anything?

What position may we safely take from that decision as a starting point?

That case was a supplemental bill in the nature of an original bill, brought by the Minnesota Company, to have settled the very questions sought to be determined on this appeal. The bill set forth all the mortgages on both divisions, (this record does not contain them all,) and made parties defendant the present appellants and the St. Paul Company, which is another advantage that case has over this appeal. After the decision in 2 Wallace, 642, remanding that case, an answer was put in, and the case is here again on the respective appeals of the St. Paul Company, the Minnesota Company, and the trustees under the land grant mortgage, being Nos. 416 and 418 on the docket, December T., 1866.

Now, the Court in their opinion say, *p.* 632:

"The present suit is really a continuation of that one," (meaning the foreclosure suit in which the present appeals are brought.)

"The rights of the parties depend upon the construction which is placed upon the acts of the Court in it; and the present bill is necessary in order to have a *declaration of what was intended by the orders and decrees made in that suit*, and to enforce the rights which were established by it."

Again, speaking of the outrageous, unjust, and illegal orders by which the St. Paul Company obtained possession of the whole rolling stock, the Court, after having pronounced these orders illegal, say, *p.* 633:

"An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the Court, and the party injured comes now to the same Court to

have the abuse corrected, and to carry into effect *the real intention* and *decree* of the Court, and that while the property, which is the subject of contest, is still within the control of the Court and subject to its order."

Again the Court say, (I quote from the unabreviated opinion of the Court—See *p.* 164, Record No. 416:)

"In reference to the road-bed, which is covered by these various mortgages, there is no diversity of opinion; but in reference to the rolling stock it is contended by the appellees that these several mortgages were *successive liens* on *all* the rolling stock of the Company, and by appellants that they are liens *only* on the rolling stock *belonging* to, or *in some way identified with, that part of the road included in each mortgage respectively*. At first blush, it would seem that in a road used continuously as one road, there could be no such definite relation between any particular division of the road and any particular portion of the stock.

"*But as it was competent for the Company which owned all the road and all the stock, to assign certain stock to one division, and certain stock to the other division*, when the road was divided for the purpose of making mortgages, we cannot assume as a fact that there was no such division of the rolling stock; but must look to the language of the mortgages themselves to see if any such intention is expressed. If it is not, then obviously the other view prevails, and the mortgages are successive liens on the whole stock.

"The descriptive part of the Palmer mortgage is in the following words:

"'All their said road, from its eastern termination in the City of Milwaukee to Portage City, in the county of Columbia, being ninty-five miles in distance, constructed and to be constructed, together with all and singular the railways, land procured or occupied, or so to be for right of way within the limits aforesaid, together with bridges, fences, privileges, rights, and real estate owned by said Company for the purposes of said road, or which may hereafter be acquired or owned by them within the limits aforesaid, and all the tolls, income, issues and profits to be had from the same, and all lands used for and occupied within the limits aforesaid, by depots or stations, with all buildings standing thereon, or which shall be procured therefor, together with all locomotives, engines, and tenders, passenger cars and freight cars, shops, tools, and machinery now owned, or hereafter to be acquired by said Company, and in any way belonging or

appertaining to said railroad now constructed and to be constructed within the limits aforesaid, including all its property, real and personal, pertaining to said railroad within said limits, and all its rights, credits and franchises thereunto appertaining.'

"The corresponding part of the mortgage on the Western Division is as follows:

"'All and singular the several tracts, pieces or parcels of land which are now or may hereafter be, or constitute the site of the road, way, turnouts, engine houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made or to be built or made hereafter; and also all and singular the locomotives, engines, and other rolling stock, and all the other equipments of every kind and description which have already been or may be hereafter procured for or used on said road, or either of them, and all the materials, tools, implements, utensils, and other personal property which have been or may hereafter be procured for or used *in connection with said roads, or either of them*; and also all and singular the rights, liberties, privileges, and franchises of said Railroad Company, of every kind and description, relating to said roads.'

NOTE.—*The "said roads, or either of them,"* refers to the roads—
1. From Madison to St. Croix River, or Lake.
2. From *Portage* to La Crosse. (See p. 11, Transcript, No. 159.)

"The language thus quoted has been the subject of much minute criticism on both sides, and, when considered in reference to the rolling stock alone, may not be free from doubt as to its construction. But when we consider it in reference to the clear purpose of the parties to make the mortgage distinct and different as to everything else conveyed by them, we conclude *that it was intended that the rolling stock covered by each mortgage was that which was properly appurtenant to each particular division of the word.*"

The Court further say, (2 Wall., 636,) that the complainants in this foreclosure suit, by omitting to make the mortgage on the Eastern Division parties defendants, "show their own construction that their mortgage, and that of Bronson and Soutter, did not cover the same stock, *which would only be because it was appurtenant to the Eastern Division.*"

Again the Court say, p. 636:

"About the time that foreclosure suit was commenced, (meaning the foreclosure on the Western Division,) a suit was instituted in the same Court to foreclose the second, or Bronson and Soutter mortgage, on the Eastern Division, but the holders of the Palmer mortgage were not made defendants on either suit. The two suits progressed *parti passu* to a final decree, but while the Western Division went to sale, an appeal stayed proceedings in the Eastern Division case, and no sale has yet been made under that decree. Very shortly after these suits were commenced, the Court made an order of reference in each of them to masters in chancery, who were the same masters in both cases. These references were for the purpose of ascertaining the amounts due on these bonds, the amounts due certain judgment creditors, *and the amount of rolling stock on the whole road, and the amount included in each mortgage.*

"The language of the order of reference on the latter point in the original suit in the case is as follows:

"'And it is further ordered that masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof *that is covered by this mortgage*, also in the *first and second mortgages respectively.*

"'The reference in the other case is in language almost identical.

"'Now it is argued that the object of this order was to ascertain and settle the *priorities* between these different mortgages. No such inference can be made from the language, for it says nothing about priorities in date, or superiority of lein. There was no occasion or reason for ascertaining those priorities in that suit, *for the respective parties were not before the Court, and could not be bound by its decree.* It would not even bind complainants, because there would be no mutuality in the estoppel. It is an impeachment of the legal attainments of the Court, and of the counsel, to suppose that they would make a reference to a master to ascertain a fact which could have no influence on the suit, and, if passed upon by the Court, could effect nobody's interest in the slightest degree.

"'But the language of the order clearly implies a different thing. The object is to ascertain *what is covered by one mortgage to the exclusion of the other;* an object which had manifest pertinency to the duty which the court was called upon to discharge. The judge who made these orders delivered an opinion at the trial, in which he decides that the rolling stock of a railroad is a fixture; and if we sup-

pose him to have considered that which was mortgaged to Palmer, and to Bronson, and to Soutter, as a *fixture on the Eastern Division*, and that which was mortgaged to Bronson, Soutter, and Knapp, *as a fixture on the Western Division*, we have a clear idea of what he wished to ascertain, in view of the decision he was to make in the two suits.' "

The opinion then states the reports of the masters and the exceptions taken thereto, the overruling of the same, and proceeds, p. 639 :

" We regard this as a judicial decision, that complainant's mortgage did not cover the rolling stock which was covered by the previous mortgage to Palmer, and that it only covered the forty box cars, and such proportion of the rolling stock purchased by the receiver as the net earnings of the Western Division. This order modifying and confirming the report of the masters settled the rights of the parties, and by that decision they must stand until it is reversed on appeal, or set aside by some direct proceeding for that purpose.

"The final decree ordering the sale proceeds upon the same view of the rights of the parties. After ordering a sale of the property mortgaged, and copying the language given in the mortgage, as descriptive of what was mortgaged, the decree adds :

" ' With forty box cars, &c., and such portion or share of the rolling stock purchased and procured by the receiver, costing $147,942.63, as the net revenues of the portion of the road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. The remaining rolling stock is subject to a prior mortgage.

" ' That is to say, having decided that what is covered by the other two mortgages is not covered by this ; it is not subject to sale in this suit.

" ' The marshal, however, who was directed to make the sale, instead of a master commissioner, did sell all the rolling stock, and that sale was confirmed by the order of the District Court of May 5, 1863.

" ' It is too clear for argument that a sale by the marshal, authorized by a decree, is without any validity. Does the order of the Court confirming the sale make it valid ?

" ' Upon principle the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nulity, and we doubt if a Court can make

it valid by a mere general order of confirmation. If, however, an issue had been made by exceptions or other proper pleading, as to the question whether any particular piece of property had been included in the *decree or order of sale*, and the Court had decided that it was so included, it might be an abjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. *There is every reason on the contrary to believe that the Court had no suspicion that the marshal had sold more than the decree authorized.*

"'On the 7th day of May, two days after the order of confirmation, the Milwaukee and St. Paul Railway Company presented their petition for the discharge of the receiver, and for possession of the property which they had purchased. The Court thereupon made an order "that the receiver deliver over to the said Milwaukee and St. Paul Railway Company the said road and appurtenances, being Portage City and La Crosse, *and the rolling stock and property specially described in the decree.*" The only rolling stock specially described in the decree was the forty box cars, and the proportion of stock purchased by the receiver.

"'The fact that this was ordered to be delivered to the purchasers and no more, is almost conclusive of two things: first, that the judge understood his decree and previous rulings as we have interpreted them; and second, that he had no idea that he had confirmed the sale of all the rolling stock on the road to the purchasers at the sale. It is true, that over a month later he ordered the Eastern Division of the road, and the remainder of the rolling stock into the possession of the same Company. But this was *done to enable them to run the whole road as a through route, on the principle of public policy, and that it was better for all parties concerned. This he declared in an opinion delivered at the time, and it is substantially indicated in the orders themselves.*

"'In the light of these facts, we cannot give to the order of confirmation in this case the effect of making valid the marshal's sale, however the rule might be on that subject in other cases. But we do not mean to intimate that in any case a sale by a marshal, or master in chancery, can be valid, when there is no decree to support it. Cases in this Court (Schriver v. Lynn, 2 Howard, 43; Brignardello v. Gray, 1 Wallace, 627,) would seem to indicate that it cannot.'

"The order of June 12, 1863, delivering possession of this property to the Milwaukee and St. Paul Railroad Company, has been declared by this Court to be void for the want of

jurisdiction, and has been set aside by this Court which made it. It therefore affords no support to defendants in this claim to the rolling stock in dispute.

"We have thus examined, with care and patience, *the mortgage*, and the various orders and decrees of the District Court, on which the claim of the Milwaukee and St. Paul Railroad Company to the ownership of this property depends. There is in all of them some want of clearness and precision, including the mortgage itself. Before the Court ordered the sale, it should have made clear all the ambiguities. It evidently attempted to do so, and we think if it has not in all cases effected that purpose fully, it has furnished the criteria by which it can be done. And although the language of its orders is not always free from doubt, we have been able to satisfy ourselves of the Court's intentions.

"The title of appellant is clear on the record, unless it has been diverted by these proceedings. We think that they do not confer title to the rolling stock on the Milwaukee and St. Paul Railway Company, nor divest the appellant, except as to the forty box cars, and the proportion of the stock purchased by the receiver, which the net earnings of the Western Division bore to the net earnings of the Eastern Division, *and that they also decide* that the mortgage under which they claim did not include any more."

These things, then, may be considered settled—

1. That there is another suit pending, and which is supplimental to this cause, and is in this Court for review, which this Court pronounced the proper suit to declare "the intention of the orders and decrees in the suit, and to enforce the rights established by it."

2. That the land grant mortgage and the first mortgage on the Eastern Division covered only rolling stock appurtenant to each separate division of the road, and that they were not liens on the same rolling stock, differing in the order of dates, but liens on entirely different rolling stock.

3. That by the reference in this suit and the decree of sale thereon, it was determined that the land grant mortgage covered only forty box cars; that these were all the decree directed to be sold; that so far as the marshal sold more than the forty box cars, his action was invalid, and the order of the Court confirming it did not make it valid.

These propositions were settled in December, 1864, and since then this vast and constantly increasing litigation has been continued in consequence of the contumacious conduct of the St. Paul Company, until at this term there were seventeen cases on the docket of the Court, to say nothing of the numerous cases in the Courts below. Of course the conduct of this litigation and of the parties since December, 1864, has been influenced and determined by the principles thus supposed to be settled; to depart from them now would only aggravate the confusion and ruin that this controversy produces, and open a new and as yet unexplored field of fresh litigation. In this connection it is submitted that the decree and advertisement of sale and the report of sale contained exactly the same description of the premises sold as the mortgage did, in addition to the description of the forty box cars, the latter being connected with the mortgage description by the conjunction "and," (*Transcript* pp. 12, 430, 194*, 196*.)

FOURTH.

What remedies may the Court adminster on this appeal under any and every possible view that may be taken of this case?

In this connection it must be remembered that the appellants made no objection to the sale, went on and enforced their decree, has their sale confirmed, and received the money from the purchaser.

a. The Court cannot set aside the sale. (See the authorities collected in Mr. Cary's brief, p. 39.)

In Bronson *vs.* Railroad, (2 *Black*, p. 530,) the Court say:

"If the decree was reversed, there could be no restitution of the road, its property and franchises, for purchasers at a judicial sale are protected."

b. In the next place it is not exactly the duty of this Court to give the appellant an opinion that the proper construction of the decree of sale was that it included all the rolling stock, and then affirmed the decree, as they are invited to do by counsel for appellants at pages 27 and 28 of his brief. This Court sits to hear and decide appeals, not to

give opinions to parties or to give "authoritative expositions" of the decrees of other Courts.

Besides, in this connection, the question at once presents itself: What interest have the appellants in having the decree construed and explained, and then *affirmed?* Would it put any money in their pocket or advance any interest of theirs?

No one but the St. Paul Company are interested in having this course pursued; The counsel does not represent them on this appeal; They are not a party to it, and would not be bound by any decision made in it.

c. The Court cannot modify the decree by making it include other property, without directing the other property to be sold. The appellants have no interest in such a modification; but only the purchaser, and he has no such right, does not ask it, and is not represented.

d. The inquiry then presents itself: Can the Court modify the decree as the appellants ask, (p. 38 of their brief,) by providing that it shall include the additional rolling stock, and that the marshal proceed to sell the same. We submit that if even there had been error, and the appellant on this record should have had such a remedy and such a decree, he cannot have it now, because he has enforced his decreee and sold the mortgaged premises, which, under the circumstances of this case, and taking into view the character of the property, is a waiver of and a bar to his appeal. It is to be borne in mind that the property that would be thus disposed of on a second sale is rolling stock, comparatively worthless when severed from the road. See the dissenting opinion of Nelson J., 2 Wallace, 642, as to the value of rolling stock severed from a road.

The party upon whom this sacrifice would fall is the owner of the equity of redemption, and it is as much entitled to be protected from such an injury by the principle we invoke as the purchaser in case of a reversal of a decree of sale.

e. Whilst it is conceded that in many cases the enforcement of a decree or judgment will not present or bar an appeal, yet in many other cases the Court hold the appeal

inconsistent with the enforcement of a decree. Where there can be a judgment of restitution, or where no injury is inflicted by the enforcement of the decree that cannot be redressed on its reversal, or, where, as in *Merriam vs. Haas*, 3 *Wallace*, 687, in a foreclosure case, a certain amount is conceded to be due and the plaintiff receives the same, he may still appeal.

But, in a case like this, when there has been stricken from the mortgage premises an item comparatively worthless, if sold alone, the mortgagee has no right to proceed and sell the mutilated railroad and then appeal for the purpose of selling the severed item; but. his duty is to redress the error first, as it is the right of the owner of the equity to have the whole sold together.

Taylor vs. Savage, 17 *Peters*, 226.
Bennet vs. Van Syckle, 18 N. Y. Rep., 481.
Vail vs. Remsen, 7 *Paige*, 206.
Ubsdell vs. Roat, 3 *Abbott, R.* 143.

The authorities cited by the counsel for appellants do not sustain his 5th point, (page 38,) as a general proposition; they merely show that in particular cases and under particular circumstances a party may enforce a decree and also appeal. As evidence of this, a summary of these authorities is here presented.

Dyett vs. Pendleton, 8 *Cowen*, 326.

After judgment and error brought, no bail being in, the defendant in error sued out a *fi. fa.*, and the plaintiff in error gave his notes for the amount of the judgment, agreeing that it would stand as security, held no ground for setting aside or staying proceedings on the writ of error. Even the payment of the judgment would be no ground for this. Per Jones, Chancellor, and Colden, Senator.

Answer to this case: Not applicable; it being the defendant in the judgment who brought the suit of error, and whom it was claimed had lost his right to appeal.

Clowes vs. Dickenson, 8 *Cowen*, 328.

A party may appeal from a final decree in chancery at any time within five years, though he have accepted the money awarded by the decree.

In this case the chancery decree was for damages, interest, and costs, and the plaintiff appealed because he wanted more. Spencer, Senator, said: In the absence of any adjudged case, I cannot undertake to introduce an exception into the statute allowing appeals and writs of error unless there be some strong reason assigned which shows that such exception would be within the meaning of the legislature. I cannot discover any such reason in the fact that a party accepted what he was entitled to by the judgment of a Court, and which would belong to him in any event, for I cannot admit the correctness of the argument of the counsel of the respondents that this decree may be reversed *in toto*.

Higbie vs. Westlake, 14 N. Y., 281.

A creditor may appeal from a decree of distribution made by a Surrogate, notwithstanding he receives on account of his demand the amount awarded to him by it.

Denio, C. J., says: There is no weight in the objection that the creditors who appealed had received their dividends under the decree of the Surrogate. They were certainly entitled to the amount paid them, and there was no inconsistency on their part in receiving that amount, and then appealing for the purpose of obtaining a reduction of the allowance for expenses which would give them a further dividend.

Erwin vs. Lowry, 7 *Howard*, 173.

When the Court ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the party, before the writ of error was sued out, will not be a sufficient cause for dismissing the writ of error.

In this case, in a petition filed by the successful party, Lowry, an order was made giving the petitioner possession of a plantation and slaves; but requires as a condition that he should pay the defendant (*Erwin*,) $436, or else deposit

it with the sheriff to defendants' credit. Lowry paid it to the sheriff, who paid it to Erwin, and after this Erwin appealed.

Merriam vs. Haas, 3 *Wallace*, 687.

Bill for foreclosure of mortgage for $6,000. Defendant answered, admitting $4,000 with interest due, and submitting to a decree for that amount. Decree for $4,000, with interest; plaintiff appealed. Afterwards there was a sale and report of master; but before it was confirmed, defendant paid amount of decree. Motion to dismiss, appeal denied.

United States vs. Dashiel, 3 *Wall.* 688.

Where a writ of error is taken to this Court by a plaintiff below, who, previous to taking the writ, issues execution below and gets a partial, but not a complete satisfaction on his judgment, the writ will not in consequence of such execution be dismissed.

Mr. Justice Grier, (with whom concurred Nelson and Swayne, J. J.,) dissenting: I think this writ of error ought to be dismissed. The plaintiff having elected to take execution and satisfy his judgment, has no longer any judgment upon which the writ can operate. His election to accept and execute his judgment below is a retraxit of his writ of error. Such has been the unanimous decision of every Court of law that has passed on the question. Appeals in chancery can furnish no precedents for a contrary decision. A decree in chancery may have a dozen different parts, some of which may stand good and be executed, while others may be litigated on appeal; a judgment at law is one thing. The plaintiff cannot divide his claim into parts, and when he obtains judgment for part, accept that part and prosecute his suit for more. Having a right to elect to pursue his judgment or his writ of error, he cannot elect to have both.

In Bronson vs. La Crosse Railroad Company, 1 *Wallace*, 409, which was decided after the decision of the motion to dismiss appeal, (*Merriam vs. Haas*,) the Court (*Nelson, J.*) say:

"Another reason why this particular case is not within the provisions of the 3d of March is that the District Court, even if it had jurisdiction of the proceedings, would not be warranted in taking any steps in the execution of the decree in favor of the appellants. They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert that the decree is founded on error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal."

It is difficult from the cases to discover a clear proposition which shall determine when the enforcement of a decree or judgment is at bar to an appeal, and probably the safest rule is to consider in each case whether the proceedings are inconsistent, or will work irreparable injury. In *Benkhand vs. Babcock*, 17 *Abb.*, 422, an attempt is made to define the rule by Robertson, C. J., as follows:

"It is claimed by the defendants that the plaintiffs have waived their appeal in this case by accepting from them the amount from the verdict in favor of the latter with costs. Numerous authorities have been cited to us on the argument to sustain that proposition, but they will all be found to be cases where an appellant had attempted *actively* to enforce either the whole of a judgment, order, or decree, in his favor, or else some part thereof, connected with or dependent upon such other part thereof as he may have appealed from, or else where he had availed himself of some benefit or favor granted or offered to him by such judgment, order, or decree, as an alternative to exercising the right of appeal."

This case contains one test which is often applied, *viz:* Whether the *appellant* himself is *actively enforcing* the decree —an important distinction, as in some cases where the appeal was allowed there was a mere *passive* reception of money by the appellant.

f. If the record shows error in the distribution of rolling stock to the different mortgages, it arose on the reference to the master, and it can only be corrected so as at the same time to do justice to the owner of the equity of redemption by setting aside the decree and sale and opening the reference, and having the report corrected and a new decree and sale; and insomuch as this Court can not set aside the

sale, the appellant has lost his remedy by proceeding to the sale.

The mere statement of the appellant's own view of the case is enough to show this:

A mortgage of a railroad, including rolling stock on a reference preliminary to the decree, has the injustice done him of a decision, excluding the rolling stock from his mortgage, and is obliged to take a decree for the sale of the road without the rolling stock. The owner of the equity, a party defendant, has not been instrumental in this, but has allowed the bill to be taken as confessed. Instead of appealing and having the decree corrected, the mortgagee first sells the railroad alone, and then appeals and asks to have the rolling stock sold by itself. What more frightful injustice to the owner of the equity to sell his road and his rolling stock by separate sales? Such a sale would be productive of a great sacrifice in each instance, and, in the case of the rolling stock, ruinous.

No Court of Appeal will do this when ruin and sacrifice are solely caused by the mortgagee's insisting on enforcing an erroneous decree and then appealing from it.

From the foregoing considerations it is claimed that even if there were error in the decree, as to the amount of rolling stock included in the mortgage, the judgment must be affirmed.

II.

There was no error committed in any part of the proceedings in reference to the rolling stock.

1. And under this head we still insist that, by virtue of the decision in 2 Wallace, 609, it is the law of this case, that the land grant mortgage covered only certain rolling stock that was incident to the Western Division, and constituting only a portion of the whole rolling stock of the road, and that all the rest of the rolling stock not covered by the land grant mortgage was covered by other mortgages, and belonged to the Eastern Division.

2. It is submitted that without relying upon 2 Wallace, as *res adjudicata* on this point, the language of the mort-

gages and the word "*roads*" in the land grant mortgage, relating to the Western Division, conclusively prove this. The language of the mortgages is conclusive on this point. (*Transcript, pp.* 11, 12, *No.* 159.)

3. The supplementary mortgage relied on by appellant, and executed after all mortgages on such division were delivered, does not prove a different intent. This supplementary mortgage, the appellant's brief states, was not "counted on" or foreclosed in this action, and is claimed outside of these proceedings to be an unforeclosed mortgage presenting an independent right to the rolling stock; to which claim, when properly presented, there are conclusive answers, some of which are presented in the following extract from the brief of Mr. Carpenter on the motions argued by him at December Term, 1866, (*Original, No.* 10:)

VIII.

The St. Paul Company also pretends that since the adjudication of this Court against its pretentions of ownership to this rolling stock, a new mortgage (which we have elsewhere, and in the proper place, shown to have been a most glaring fraud) has been discovered; which has never yet been foreclosed, and which they claim mortgaged all the rolling stock to Bronson, Soutter, and Knapp.

The answers to this are so numerous that it is difficult to select. A few may be enumerated:

(1.) The mortgage is a mere chattel mortgage, and never was filed according to the statute; and for that reason is, by the statute, declared void as against creditors and *purchasers*. The Minnesota Company is a purchaser, at the forclosure sale, under a subsequent mortgage. This chattel mortgage is therefore wholly void as to said Company.

R. S. Wis., 1858, (re-enactment,) ch. 45, sec. 3.
Cotton vs. Marsh. 3 *Wis.*, 221.

(2.) The mortgage was never renewed by affidavit, as required by statute, and expired in one year from its date, R. S. ch. 45, sec. 5.

(3.) The mortgage itself provides that the property therein conveyed should be held by Bronson, Soutter, and Knapp under their principle mortgage, and that they should sell and dispose of "the same in the same manner, at the same time, and upon the same conditions," as the other property mortgaged, *and not* otherwise.

The trustees sold the other property under the decree obtained upon that mortgage in 1863; and now to authorize them to forclose this mortgage by subsequent and independent proceedings, *would be to override the express provisions of the mortgage itself*, and give the trustees a power under the mortgage, that the mortgage *expressly* denies.

(4.) But waiving all these objections, conceding the validity of the mortgage, and the right of the trustees to foreclose it: how can the St. Paul Company claim any benefit from it? That Company is not the mortgagee, is not an assignee of the mortgage, has no rights and pretends none, except as holder of bonds secured by the mortgage. The Minnesota Company—the owner of the equity of redemption—cannot be deprived of its rights until it is foreclosed; and on the foreclosure of the mortgage, if it should ever be foreclosed, the property must be sold at public auction, and we are as likely to become the purchasers as they are. One of two things is certain; this mortgage either has or has not been foreclosed.

1. If it has been, then it is merged in the Western Division foreclosure decree; and this Court has already decided that the St. Paul Company acquired no title to this property by virtue of their purchase under that decree.

2. If it has not been foreclosed, then the St. Paul Company, which is a purchaser of only what that decree ordered to be sold, can claim no benefit under this mortgage, which was not foreclosed by that decree.

The idea that a purchaser at a sale, on the foreclosure of one mortgage, becomes thereby entitled to claim other property included in another mortgage which has not been foreclosed, rests upon no authority that I know of, except the text, "For whosoever hath, to him shall be given, and he shall have more abundance; but whosoever hath not, from

him shall be taken away even that he hath." This eccentric disposition of spiritual gifts that has troubled commentators not a little, has never been adopted into positive jurisprudence, or applied to rolling stock on a railroad.

3. If it be true, then the appellant had a mortgage which covered a part of the rolling stock of the road, distinguished only as such part as was incidental to the Western Division, and had not already been made incidental to the Eastern Division; the burthen of proof was on the appellants to show how much of the rolling stock their mortgage covered; it was a part of their case that they were bound to make out by affirmative proof.

For this purpose they took an order of reference, and in the vast mass of evidence produced on that reference they have not exhibited any testimony showing that their mortgage covered more than the forty box cars. The only oral testimony given on that point is the following: The appellant called Edwin H. Goodrich, (*Trans.*, *p.* 270,) who in his direct examination testified, *p.* 272:

"At the date of the first mortgage there was no rolling stock on hand, June 30, 1854. At the date of the mortgage to Bronson and Soutter, August 17, 1857, the cost of the rolling stock on hand was $544,492.16. At the date of the land grant mortgage, 31st of December, 1856, the rolling stock on hand cost $455,001.06. At the date of the order of reference in these causes, 11th of March, 1861, the cost of the rolling stock on hand was $623,235.78. None of the rolling stock was purchased with land grant bonds, but part of it was paid for with the proceeds of the land grant bonds. *Out of the proceeds of those bonds (issued under the mortgage to Bronson, Soutter and Knapp)* $3,000 was paid for the right to use a car brake, and $31,979.64 *was paid for forty box cars.*"

Mr. Goodrich also testifies, (*p.* 179, *Transcript*):

"The *Western Divison* is charged for *the use of the rolling stock.* We charge it two cents a mile for passenger and baggage cars, one cent a mile for freight cars, and five cents a mile for locomotives, for every mile run on that division of the road, in addition to the expenses of repairs."

See accounts, (*pp.* 182, 183, *Transcript.*)

In this connection it is proper to notice that the bill states that when the land grant mortgage was executed the Western Division was not constructed, (*Transcript*, *p.* 5,) but the Eastern Division was then constructed and in operation, (*Transcript*, *p.* 3.) The Western Division was not completed till October, 1858, (*p.* 5.) Of course, therefore, all the rolling stock belonging to the company, except the forty box cars, was attached and appurtenant to the Eastern Division, and was purchased with the proceeds of the mortgages on that division.

In giving this evidence the appellants showed their approval of the natural equity suggested by the district judge, and attempted to use it to show to what extent their mortgage covers rolling stock. The appellants, putting on that ground, ought not now to be allowed to say that the evidence is insufficient, or the theory wrong; and if, as the fact is, this whole record, from beginning to end, contains no other affirmative evidence, showing that the appellant's mortgage covered more than these forty box cars, they cannot complain that no more were allowed to them, excepting upon the false notion of their Brief, that they were entitled to the whole rolling stock of the road, unless some of the owners or lien holders of a portion of the rolling stock, not parties to their action, came before the masters and showed affirmatively how much of the stock belonged to and was covered by their liens. This would be to shift the burden of proof from the appellant where it belongs upon the shoulders of those not parties litigant in this suit.

4. I have thus far considered this branch of the case as if the transcript contained all the evidence which was given before the masters, but it is apparent from the report of the masters, (*Transcript*, *pp.* 115, 118,) that they had in evidence before them the other mortgages on the Eastern Division, and took other testimony which is not on record.

The attention of the Court had early in the suit been called to the subject by the receiver. (*Transcript*, *pp.* 48, 51.)

The order of reference (*Transcript, p.* 112) required that the masters should consider the question.

Frequent mention is made of the several mortgages on the separate divisions.

It is submitted that this Court might with equal propriety set aside the findings of a jury upon questions of fact as against the weight of evidence, where there is no bill of exceptions or case containing the whole evidence, as to reverse the report of the masters on this finding of fact upon the partial and imperfect return of the evidence before them.

FINALLY.

There must come a time in all cases when there must be an end of litigation, even in this case, and the end of litigation in it can be only reached by adhering to the principle *stare decisis*. To depart from that principle will engender a litigation not only interminable but ruinous to all parties concerned. The Court therefore should adhere as far as possible to the uniform course of decision of the district judge, and of the circuit judge, and the principles laid down in their opinions, so far as they have been recognized and adopted by the decision of this Court in this litigation. To depart from them will not only produce the injury and inconvenience already pointed out, but will present this singular and much to be avoided result: (1) The mandate of this Court in the Eastern Division suit, directing that the whole of the rolling stock, excepting forty box cars, should be delived up to the owner of the Eastern Division, on the faith of which mandate between four and five hundred thousand dollars have been paid, and (2) an utterly conflicting mandate in this case, taking away all the rolling stock from the Eastern Division, and the owners and parties interested therein, and giving it to the parties interested in the Western Division, not litigant in this appeal or bound by the decision thereof.

H. A. CRAM,
Council for Appellees.